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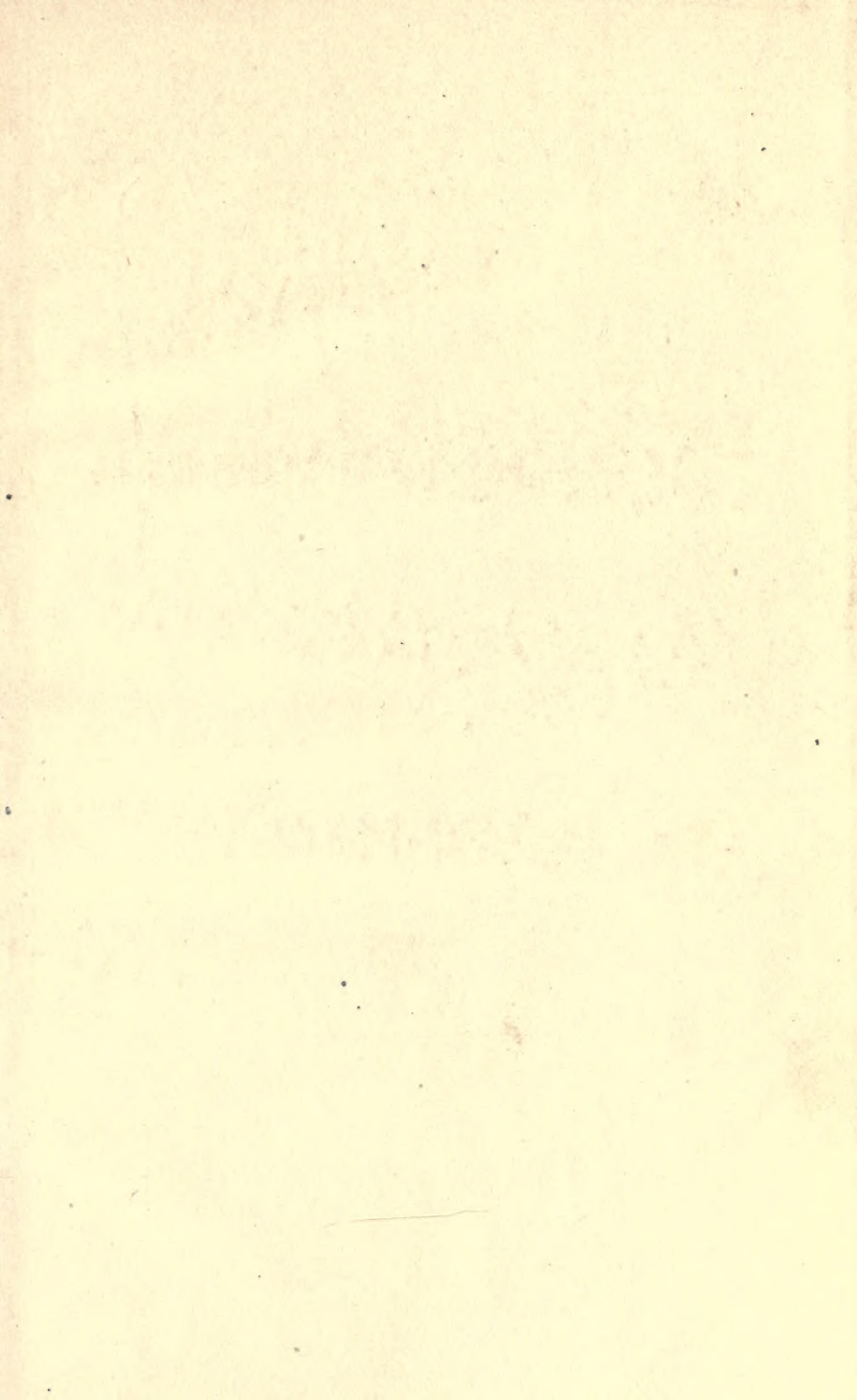


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REPORTS OF CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

TERRITORY OF WYOMING

EXTRA ANNOTATED EDITION

BY J. A. RINER

ATTORNEY AT LAW.

VOL. II.

[Containing four cases omitted in Vol. I. of these Reports, and the cases submitted at the March Term 1878, March Term 1879, March Term 1880, March Term 1881, and the March Term 1882.]

SECOND EDITION.

CALLAGHAN & COMPANY

CHICAGO

1912

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REPORTS OF CASES

ARGUED AND DETERMINED

v. 2

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THE SUPREME COURT

OF THE

TERRITORY OF WYOMING

EXTRA ANNOTATED EDITION

Entered according to Act of Congress in the year one thousand eight hundred and eighty-three, by
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VOL. II.

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SECOND EDITION.

CALLAGHAN & COMPANY

CHICAGO

1882

JUSTICES OF THE SUPREME COURT

FROM THE ORGANIZATION OF THE TERRITORY.

Chief Justices.

JOHN H. HOWE From April 6th, 1869, to Oct. 14th, 1871.
JOSEPH W. FISHER..... From Oct. 14th, 1871, to Dec. 18th, 1879.
JAMES B. SENER..... Since Dec. 18th, 1879.

Associate Justices.

JOHN W. KINGMAN... From April 6th, 1869, to Mar. 20th, 1873.
WM. T. JONES..... From April 6th, 1869, to Feb. 8th, 1871.
JOS. W. FISHER..... From Feb. 8th, 1871, to Oct. 14th, 1871.
JOS. M. CAREY..... From Jan. 18th, 1872, to Feb. 14th, 1876.
E. A. THOMAS..... From March 20th, 1873, to Dec. 14th, 1877.
JACOB B. BLAIR..... Since Feb. 14th, 1876.
WM. W. PECK..... From Dec. 14th, 1877, to Jan. 11th, 1882.
SAMUEL C. PARKS.... Since Jan. 11th, 1882.

Present Bench.

JAMES B. SENER.....	} <i>Chief Justice.</i>
JACOB B. BLAIR.....	
SAMUEL C. PARKS.....	

..... } *Associate Justices.*

JUSTICES OF THE SUPREME COURT

FROM THE ORGANIZATION OF THE TERRITORY

Chief Justice

JAMES H. SEWELL From Dec 1861 to Jan 1870
 JOHN W. FISHER From Oct 1861 to Dec 1869
 JOHN H. HOWE From April 1860 to Dec 1861

Associate Justices

SAMUEL C. PARKS Since Jan 1862
 W. H. PEELE From Dec 1861 to Jan 1862
 JACOB B. BLAIR Since Feb 1861
 E. A. THOMAS From March 1861 to Dec 1861
 JOS. M. FARLEY From Jan 1861 to Feb 1861
 JOS. W. FISHER From Feb 1861 to Dec 1861
 WAT. T. JONES From April 1861 to Dec 1861
 JOHN W. KINGMAN From April 1860 to Mar 1861

Present Bench

JAMES H. SEWELL Chief Justice
 JACOB B. BLAIR Associate Justice
 SAMUEL C. PARKS Associate Justice

CASES REPORTED

A.

	PAGE.
Adams Bros., Johns v.....	194
Alsop, Farrell v.....	135

B.

Beaucaire v. Sawyer et al.....	125
Beckwith, Garbanati v.....	213
Beckwith & Co., Garbanati v.....	216
Bonnifield, Price v.....	80
Boughton, Hecht v.....	385
Brophy v. J. M. Brunswick & Balke Co.....	86
J. M. Brunswick & Balke Co., Brophy v.....	86
Byrne, The U. P. Ry. Co. v.....	109

C.

Carr v. Ryan.....	130
Castle v. County Commissioners.....	126
Chiniquy, O'Brien v.....	56
City of Cheyenne, Kent v.....	6
Clark Adams et al., O'Brien v.....	443
Conley, Territory v.....	331
Cook & Corey, Lee v.....	312
County Commissioners, Castle v.....	126
County Commissioners, Garbanati v.....	257
County Commissioners v. Johnson.....	259
County Commissioners, Moore v.....	8
County Commissioners, Mosher v.....	462

D.

Davis, Fein v.....	118
Donnellan, The U. P. Ry. Co. v.....	478

E.

Edwards v. O'Brien.....	493
Emery, Jenkins v.....	58

F.	PAGE.
Fallen v. Ferris.....	144
Farrell v. Alsop.....	135
Fein v. Davis.....	118
Fein v. Tonn.....	113
Ferris, Fallen v.....	144
Fillmore v. The U. P. Ry. Co.....	94

G.

Garbanati v. Beckwith.....	213
Garbanati v. Beckwith & Co.....	216
Garbanati v. County Commissioners.....	257
Garbanati v. Hinton et al.....	271
Granger v. Lewis Bros.....	231

H.

Hecht v. Boughton.....	385
Hilliard Flume & Lumber Co., Woods v.....	457
Hinton et al., Garbanati v.....	271
Hinton v. Winsor.....	206
Hoy v. Smith.....	459

J.

James, Snyder v.....	252
Jenkins v. Emery.....	58
Johns v. Adams Bros.....	194
Jubb v. Thorp.....	406
Johnson, County Commissioners v.....	259

K.

Kansas Pacific R. R. Co. v. McCann.....	3
Kent v. City of Cheyenne.....	6
Kent v. Upton.....	53

L.

Lee v. Cook & Corey.....	312
Lewis Bros., Granger v.....	231

M.

Mason, Upton v.....	55
McCann, Kansas Pacific R. R. Co. v.....	3
McCann v. United States.....	274
McLaughlin v. Upton.....	27

	PAGE.
McLaughlin v. Upton.....	31
McLaughlin v. Venine.....	1
McNamara v. O'Brien.....	441
McNamara v. O'Brien.....	447
Moore v. County Commissioners.....	8
Mosher v. County Commissioners.....	462
Mulhern v. The U. P. Ry. Co.....	465

N.

Nelson, Territory v.....	346
--------------------------	-----

O.

O'Brien v. Chiniquy.....	56
O'Brien v. Clark Adams et al.....	443
O'Brien, Edwards v.....	493
O'Brien, McNamara v.....	441
O'Brien, McNamara v.....	447

P.

Price v. Bonnifield.....	80
--------------------------	----

R.

Roth, Warner v.....	63
Ryan, Carr v.....	130
Ryan et al., The U. P. Ry. Co. v.....	408

S.

Sawyer et al., Beaucaire v.....	125
Smith, Hoy v.....	459
Snyder v. James.....	252
Stebbins, Post & Co. v. The U. P. Ry. Co.....	71
Steele, Upton v.....	54

T.

Territory v. Conley.....	331
Territory v. Nelson.....	346
The U. P. Ry. Co., Stebbins, Post & Co. v.....	71
The U. P. Ry. Co., Fillmore v.....	94
The U. P. Ry. Co. v. Byrne.....	109
The U. P. Ry. Co. v. Ryan et al.....	408
The U. P. Ry. Co. v. Donnellan.....	478
The U. P. Ry. Co., Mulhern v.....	465

	PAGE.
The U. P. Ry. Co. v. United States.....	170
Thorp, Jubb v.....	406
Tonn, Fein v.....	113

U.

United States, McCann v.....	274
United States, The U. P. Ry. Co. v.....	170
Upton, Kent v.....	53
Upton v. Mason.....	55
Upton, McLaughlin v.....	27
Upton, McLaughlin v.....	31

V.

Venine, McLaughlin v.....	1
---------------------------	---

W.

Wanless, Ware et al. v.....	144
Ware et al. v. Wanless.....	144
Warner v. Roth.....	63
Winsor, Hinton et al. v.....	206
Woods v. Hilliard Flume & Lumber Co.....	457

CASES
ARGUED AND DETERMINED IN
THE SUPREME COURT
OF THE
TERRITORY OF WYOMING.
JULY TERM, 1871.—(OMITTED IN VOL. 1.)

McLAUGHLIN v. VENINE.

ALTERATIONS IN WRITTEN INSTRUMENTS.—An alteration in a written instrument, whether for the payment of money or for other purposes, which does not affect the original design of the parties, either by enlarging or diminishing the obligation, however improper the alteration may be, does not invalidate the instrument, nor change the weight of the obligation.

APPEAL from the District Court of Laramie County.

The action was brought in the district court of Laramie County, at its March term, 1870, by Daniel McLaughlin, endorsee of a bill of exchange for one thousand dollars, drawn by Daniel Ullman in favor of E. W. Whitcomb and accepted by Joseph Venine; the bill afterwards passed into the hands of Posey S. Wilson, for negotiation, who made an alteration in the body of the instrument by inserting the words, "or bearer."

The case was tried in the district court without a jury, and judgment rendered in favor of the plaintiff, McLaughlin, for the full amount of his claim and costs.

W. W. Corlett, for appellant.

Daniel McLaughlin, for appellee.

Opinion of the Court—Fisher, J.

FISHER, J. An alteration in a written instrument, whether for the payment of money or for other purposes, which does not affect the original design of the parties, either by enlarging or diminishing the obligation, however improper the alteration may be, does not invalidate the instrument, nor change the weight of the obligation, 15 Pick., 242. We do not, therefore, find anything in the record which requires the interposition of an appellate court. Without referring to the question of the application for a new trial we affirm the judgment of the district court.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE SUPREME COURT
OF THE
TERRITORY OF WYOMING.

MARCH TERM, 1877.—(OMITTED IN VOL. 1.)

KANSAS PACIFIC RAILWAY COMPANY v. McCANN.

DEMURRAGE, RAILWAYS.—A railway company is entitled to demurrage where the consignee of goods, after reasonable notice from the company, neglects or refuses to unload the cars in which the goods were shipped.

ERROR to the District Court of Laramie County.

During the summer of 1875, D. J. McCann, the plaintiff below, was engaged under a contract with the United States, in transporting Indian supplies from some of the eastern cities, by way of Cheyenne, to Red Cloud and Spotted Tail Indian Agencies. He had been engaged in this business during the two previous years. In June of 1875 he entered into a special contract with the Kansas Pacific Railway Company, the defendant below, by the terms of which it was to carry these supplies from Kansas City, Mo., to Cheyenne, Wyo., at the rate of forty cents per one hundred pounds. The K. P. Railway Company received the supplies from the eastern connecting lines at Kansas City, transferred them to its cars and transported them to Cheyenne pursuant to contract.

Statement of Facts.

The first car containing these supplies arrived here July 1st, 1875; and cars continued to arrive at irregular intervals until August, as the following table will show:

No. Car.	Initials.	Demurrage as follows.	No. Days.	Weight. . .	Rate. . . .	Amount.
1252	K. P.	July 17 to Aug. 17, 1875	29	20,010	\$5 00	\$145 00
1315	"	July 17 to Aug. 17, 1875	29	20,520	5 00	145 00
1210	"	July 17 to Aug. 17, 1875	29	17,980	5 00	145 00
1276	"	July 17 to Aug. 17, 1875	29	11,300	5 00	145 00
1318	"	July 17 to Aug. 17, 1875	29	19,780	5 00	145 00
758	"	July 29 to Aug. 17, 1875	18	16,460	5 00	90 00
2542	"	July 17 to Aug. 17, 1875	30	20,340	5 00	150 00
1597	"	July 6 to Aug. 17, 1875	41	20,170	5 00	205 00
712	"	July 17 to Aug. 17, 1875	30	20,520	5 00	150 00
1376	"	July 1 to Aug. 17, 1875	46	18,230	5 00	230 00
2540	"	July 15 to Aug. 17, 1875	32	15,850	5 00	160 00
752	"	Aug. 3 to Aug. 17, 1875	13	16,660	5 00	65 00
729	"	July 3 to July 21, 1875	18	18,590	5 00	90 00
1224	"	July 3 to July 21, 1875	18	19,120	5 00	90 00
2532	"	July 3 to July 21, 1875	18	18,980	5 00	90 00
1554	"	July 3 to July 21, 1875	18	18,630	5 00	90 00
770	"	July 3 to July 21, 1875	18	23,580	5 00	90 00
1550	"	July 4 to Aug. 18, 1875	44	23,580	5 00	220 00
1492	"	July 4 to Aug. 18, 1875	44	23,580	5 00	220 00
1257	"	July 6 to Aug. 18, 1875	42	11,020	5 00	210 00
1565	"	July 29 to Aug. 18, 1875	19	10,800	5 00	95 00
713	"	July 22 to Aug. 18, 1875	26	16,460	5 00	130 00
2527	"	Aug. 7 to Aug. 18, 1875	10	7,530	5 00	50 00
708	"	Aug. 7 to Aug. 18, 1875	10	13,210	5 00	50 00
2598	"	Aug. 7 to Aug. 18, 1875	10	13,700	5 00	50 00
25 cars	-----	Average no. days for each car 26	625	436,000	-----	\$3250 00

The Union Pacific Company was acting as agent for the K. P. Railway Co., in delivering goods shipped over the K. P. Railway to Cheyenne, and collecting freight charges thereon; and its station agent here at that time, one W. B. Doddridge, and the clerk in his office, one J. K. Remick, acted in this matter. These persons notified the agent of McCann when cars containing supplies for the Indians arrived, and required their removal within twenty-four hours after notice. The supplies were not removed from the cars in accordance with the notice, and twenty-five K. P. cars were suffered to remain on a side track unladen several days; and for each of the cars five dollars per day

Statement of Facts.

were charged against McCann as "demurrage" for the delay. The cars contained assorted merchandise for the Indians, and the amount in each car varied from 7,530 pounds up to 23,580. Other goods than Indian supplies were shipped in some of the cars from Kansas City.

In July, Mr. Wild, acting for McCann, offered to pay the freight charges and take the goods, but this was declined by those representing the K. P. Railway Company unless he would also pay the demurrage charged on the cars then here. He refused to do this, but offered to leave goods enough in the possession of the K. P. Railway Company, to secure the claim for demurrage, until McCann, who was absent, could return and arrange matters with it, if the rest of the supplies were delivered to him upon the payment of the freight charges. This too, was refused.

The demand for demurrage was resisted by McCann. It finally became necessary for him to obtain these supplies without further delay, and to transport them at once to the Indian agencies, in consequence of an order to that effect from the Commissioner of Indian Affairs at Washington.

The amount of Indian supplies in the cars when the order was sent from Washington was about 336,000 pounds in round numbers, and the freight charges due were \$3,367.02, while \$3,250 were demanded for demurrage and paid, in order to obtain the supplies for shipment to the agencies. The lot was received and loaded into freight wagons on the 16th, 17th and 18th days of August; and the freight and demurrage charges paid each day upon the cars unloaded. Thus, \$725 demurrage was paid August 16th; \$1,500 on August 17th, and \$1,025 on August 18th—in all \$3,250.

After the payment of this demurrage, and the receipt and shipment of the supplies to the agencies, McCann demanded this sum of \$3,250 back from the defendant, offering, however, to allow a reasonable amount for "storage," during the time the supplies remained in the cars upon the side track. The demand was refused, and this action was begun August 28th, 1875, to recover the money. The case was

Statement of Facts.

tried at the May term of the district court of first judicial district, 1876, by the court, without a jury, and the issues found for the plaintiff; and the court after allowing the defendant \$290.76 for storage and unloading of cars, rendered judgment in favor of McCann and against K. P. Railway Company for the sum of \$3,284.84 and costs of the action. A new trial was moved for by the defendant, which after argument, was denied by the court; and the case was brought up for review by petition in error, alleging error in the proceedings and judgment of the court below.

W. W. Corlett, for plaintiff in error.

D. McLaughlin, for defendant in error.

Judgment of the district court reversed.

KENT v. THE CITY OF CHEYENNE.

The failure on the part of a city to exercise judicial power, in the absence of malice and corrupt intention, constitutes no ground of action.

ERROR to the District Court of Laramie County.

On the 23d of February, 1876, the plaintiff in error filed his petition in the district court claiming damages of the defendant in error for knowingly permitting a nuisance to remain in one of its streets, whereby the team of the plaintiff in error became frightened and ran away, injuring themselves, to the damage of the plaintiff in error in the sum of one thousand dollars. The petitioner further alleged that the defendant in error was, at the time of the injury in question, a municipal corporation, that the street containing the nuisance was a public street of the city and under

Statement of Facts.

its control, that the nuisance was known to the city and was calculated to frighten horses.

The defendant in error filed a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action.

The district court sustained the demurrer, and rendered judgment against the plaintiff for costs.

W. W. Corlett, for plaintiff in error.

Thos. J. Street, for defendant in error.

Judgment of the district court affirmed.

FISHER, C. J., dissenting.

CASES
ARGUED AND DETERMINED
IN THE SUPREME COURT
OF THE
TERRITORY OF WYOMING.

MARCH TERM, 1878.—(OMITTED IN VOL. 1.)

**MOORE v. THE BOARD OF COUNTY COMMISSIONERS OF
SWEETWATER COUNTY.**

TAXATION.—The territory has no right to tax the property of a post trader at a military post situated upon an Indian reservation, and the tax if paid can be recovered back.

IDEM.—It is immaterial that such trader furnished the lists and valuations on which the taxes were levied; the right to impose a tax, and as preliminary to it to take a list and valuation of the property intended to be taxed, depends not upon the consent of the party taxed, but upon the power of the government which assumes to exercise the right, and upon the functions of the officers through whom it assumes to exercise it. The territory is totally excluded from the exercise of political power over the Indian country, either to regulate the intercourse of its subjects with it, or to extend its municipal authority into it.

ERROR to the District Court of Sweetwater County.

The case was submitted to the court below upon the following agreed statement of facts:

“It is hereby agreed and stipulated by and between the parties plaintiff and defendant hereto, that said cause shall be heard, tried and determined by the court without the intervention of a jury, upon the following agreed statement of facts; it being agreed further between the parties hereto, that the following are the facts and all the facts of this case: This action is brought to recover moneys paid by the plaintiff to the collector of taxes for said county of

Statement of Facts.

Sweetwater for the years 1873, 1874 and 1875 respectively, as taxes regularly assessed against the said plaintiff for poll and property taxes for said years respectively. It is admitted that said taxes were paid by said plaintiff under protest; and that said taxes were regularly assessed and levied and were payable to said collector for said years respectively, unless by reason of the residence of said plaintiff and the location of the property assessed the law did not authorize the public authorities in said territory to collect the same from the said plaintiff.

It is further admitted that at the time of the assessment, levy and payment of all said taxes, said plaintiff resided upon a regularly established military reservation of the United States of America, and that such military reservation was at all of said times within the territorial limits of Sweetwater county, and was also at all of said times within and surrounded by a regularly established Indian reservation, known as the Shoshone and Bannock Indian Reservation. It is further admitted that the amount of such taxes received from said plaintiff were as follows: For 1873, \$116.39; for 1874, \$93.42; for 1875, \$232.25. It is further admitted, that for the year 1874 said plaintiff was assessed upon property as follows: Merchandise, \$2,000; 4 horses, \$350; 67 cattle, \$3,120; 10 wagons, \$550; other property, \$75; total, \$6,095. That at the time the assessment for said year 1874 was made, all of said property was within the geographical limits of said Sweetwater county, and that said merchandise was upon said military reservation in a storehouse owned by said plaintiff, where plaintiff was engaged in selling goods as a merchant; that said horses, cattle, and wagons were at that time within said county and were being used as a train by said plaintiff, for the purpose of freighting goods from the Union Pacific Railroad in said county, at points thereon not on either said military or Indian reservation, to said military reservation and across portions of said country and portions of said Indian reservation; that the amount and kinds of said property owned

Statement of Facts.

by said plaintiff in the year 1874 were furnished to the assessors of said county by said plaintiff.

And it is further admitted that for the year 1875, said plaintiff was assessed upon property as follows: buildings \$500, merchandise 3,500, 5 horses \$250, 575 neat cattle \$10,350, 12 wagons \$550, other property \$200, total, \$15,350. That at the time the assessment for said year 1875 was made, all of said property last described was within the geographical limits of said Sweetwater county, and that said merchandise was upon said military reservation in a storehouse owned by said plaintiff, where plaintiff was engaged in selling said goods as a merchant, that said horses, wagons, and 75 head of neat cattle were within said county and were being used as a freighting train by said plaintiff for the purpose of freighting goods from the Union Pacific Railroad in said county at points thereon not on either of said reservations, and across portions of said county and Indian reservation; that 500 head of said neat cattle were at that time kept by said plaintiff as a stock-grower or stock-raiser for gain and profit, and were for the most part kept by said plaintiff upon said military reservation, but were at times allowed to graze and subsist upon said Indian reservation, and at times not upon either said reservations but within said county. That the amount and kinds of the property last described and owned by said plaintiff in the year 1875, were furnished to the assessor of said county by said plaintiff; said building was, when assessed, owned by said plaintiff and was situated on said military reservation.

It is further admitted that for the year 1873 said plaintiff was assessed upon property as follows: merchandise \$3,000, 4 horses \$350; 70 cattle \$3,300; 12 wagons \$600; other property \$509—total \$7,759. That at the time the assessment for the year 1873 was made, all of said property was within the geographical limits of said Sweetwater county, and the said merchandise was upon said military reservation in a storehouse owned by said plaintiff, where he was engaged in selling said goods as a merchant; that said horses,

Statement of Facts.

cattle, and wagons were at the time within said county, and were being used as a freighting train by said plaintiff for the purpose of freighting goods from the Union Pacific Railroad at points thereon not in said military or Indian reservation, to said military reservation and across portions of said county and portions of said Indian-reservation; that the amount and kinds of said property were furnished to the assessor of said county for the year 1873 as property owned by said plaintiff. It is further admitted as a fact, that portions of the taxes aforesaid, paid by said plaintiff, were poll taxes, and portions were territorial taxes, and portions were for the county school fund of said county, and that all of said territorial taxes were paid to the treasurer of said territory before the commencement of this action by the treasurer of said county; that all of said taxes belonging to the county school fund of said county, were paid out and delivered to the several school districts of said county before the commencement of this action, the same having been duly apportioned to said districts.

It is also admitted that before the commencement of this action all of said taxes had been paid to the treasurer of said county.

It is also admitted as a fact that the amount of poll tax, territorial tax, and taxes belonging to the different funds of said county, and paid by plaintiff as aforesaid, are correctly shown by the memoranda upon the margin of three exhibits attached hereto and made a part hereof and marked "A," "B," and "C" respectively, and that the said exhibits are the tax receipts for said taxes given to said plaintiff for said taxes for the years 1873, 1874, and 1875; and that exhibit "A" is the tax receipt of plaintiff for the year 1873, exhibit "B" is the tax receipt given to said plaintiff for the said taxes for the year 1874, and that exhibit "C" is the tax receipt given to said plaintiff for said taxes for the year 1875.

It is further admitted as a fact that during the years aforesaid said plaintiff was the regular post trader at said

Statement of Facts.

military reservation, duly appointed by the United States, and that during the same time he was duly licensed as an Indian trader to trade with the Indians to whom said Indian reservation belonged: and that said plaintiff during the same time sold goods from his store, upon said military reservation, to people not residing on either of said reservations nor connected therewith, as well as to persons in the military reservation of the United States, or connected with or residing upon said Indian reservation. At the time all of the property aforesaid was assessed to the same plaintiff, it was all within the limits of Sweetwater county, as said limits were established by the legislature of Wyoming Territory; and that said plaintiff claimed to and did exercise the right of suffrage in said county during the years said taxes were assessed to him.

It is further admitted as a fact that said military reservation, upon which said plaintiff resided as aforesaid, was regularly established by the United States prior to the year 1873, and subsequent to the ratification of the treaty establishing the Shoshone and Bannock Indian Reservation aforesaid, and out of lands which had theretofore constituted part of the Indian reservation; and that said military reservation was created in the same manner as other military reservations created by, and under the authority of, the United States.

Upon the above statement of facts, the question submitted to the court for its determination is: Can the said plaintiff in this action recover the whole or any portion of the said taxes paid as aforesaid by the plaintiff, from the defendant, and if so what portion of the same can plaintiff recover in this action.

E. P. JOHNSON,

Attorney for plaintiff.

W. W. CORLETT,

Attorney for defendant.

The district court found in favor of the defendant, and rendered judgment against the plaintiff for costs.

Opinion of the Court—Peck, J.

Johnson & Potter, for plaintiff in error.

W. R. Steele, for defendant in error.

PECK, J. The questions, presented for our consideration, are raised by the pleadings and the agreed statement of facts, (which latter was filed on May 4th, 1877, in the district court,) to avoid the prolixity of re-statement, our opinion is formed with reference to an abstract of the pleadings and to the agreed facts as accompanying it, and therefore in the assumption and trust that they will be inserted by the reporter, the pleadings by abstract, and the agreement *verbatim* in the reported statement of facts for the correct understanding of the decision.

The taxes in question were collected under the statute of December 10, 1869, entitled, "An act to provide a Territorial and County Revenue," Compiled Laws, 549. The act was amended by the two statutes of December 16th, 1871, and December 11th, 1875; but in particulars which do not affect the question. Section 1 of the original act declares that there shall be annually levied and assessed, upon the taxable real and personal property within the territory, territorial and county taxes, and a poll tax for school purposes; section 2d specifies what property shall be exempted, but does not embrace any of that on which the taxes in question were collected; section 3d declares that *all other property, real and personal, within this territory, is subject to taxation*, in the manner prescribed in the act; all the other sections relating to the listing, assessment, levy and collection, either in terms or by clear implication, contemplate the taxing of *all property within the territory except* such as is exempted by section 2d; provision is made for taking an annual poll list or census for the poll tax; personal taxes are enforceable by warrant, distress and sale, and the use of the *posse comitatus*; lands may be sold for taxes, and tax-titles passed to the purchaser by certificate and deed. If this statute is to operate according to its intent,

Opinion of the Court—Peck, J.

the taxes in question were, upon the facts, which are before us, lawfully collected; otherwise, not.

The right to impose a tax, and, as preliminary to it, to take a list and valuation of the property intended to be taxed, depends not upon the consent of the party taxed, but upon the power of the government, which assumes to exercise the right, and upon the functions of the officers, through whom it assumes to exercise it. Hence the fact that Moore furnished the lists and valuations, on which the taxes were levied and collected, conferred no power, not independently existing, nor was necessary to a power already existing, and is therefore immaterial. His furnishing the lists and valuations were the ordinary acts of a party threatened with taxation and desirous to avoid forcible proceedings to obtain them. The act of December 10, 1869, subjected him to penalties for refusal to permit them. The matter stands therefore, precisely as it would have stood, had the lists and valuations been compulsorily taken; and Moore stands as an involuntary party in respect to them. His payments of the taxes rest upon the same consideration. If enforced collections of them would have been illegal for want of power to tax, the unenforced collections were not legal, and the protests which accompanied the payments, were unnecessary to the preservation of his rights.

The British crown established its limits upon this continent under a principle, recognized between it and other civilized governments, and which became fixed in public law, that the jurisdiction of the crown was within those limits exclusive of all other nationalities, except the Indian nations or tribes, which were located within those limits; that the soil therein belonged exclusively to such Indian nations or tribes, except so far as the crown should acquire it from them by cession, purchase and lawful conquest; that, as an incident to the ownership of the soil, the separate dominion and sovereignty of the soil belonged to them; that they were independent political communities, nations

Opinion of the Court—Peck, J.

and governments: but that their sovereignty was so far qualified, that they could part with the titles to the soil, and its incidental dominion and sovereignty to the crown alone, that they could not hold political relations with communities, which were outside of those limits, or with each other; that they were entitled to the protection of the crown against such foreign nations, against each other, and against its subjects; and so far were dependent upon the crown.

This principle, never abandoned by the colonies after they declared their independence, was fully incorporated into the federal constitution, which confers on the United States the exclusive power to make treaties, and to regulate commerce with foreign nations and the Indian tribes. The expressions "*to regulate commerce*," "*nations*," "*tribes*," had become definite, fixed, and technical, before the constitution was adopted; to make treaties, and to regulate commerce, are things predicable only of relation and action between sovereignties; are not and have never been predicated of relation or action between a government and its subjects: the terms, "*nations*," "*tribes*," are identical, so far as they express a sovereign status; and it is clear that these terms, so identical in public law and in the government dealings with the tribes prior to the constitution, are employed by that instrument in accordance with the original principle, which treated nations who were without, and Indian tribes, which were within our limits, as sovereign, but the latter qualified by sovereign. It is not open to reasonable doubt that, as the instrument was adopted after the tribal states had become defined and fixed, it intended to treat them according to that status. Allowing that a tribe may dissolve itself, and its members become subjects of the United States, yet, as long as it sees fit to preserve its organization, it may do so. It results that these tribes have territorial boundaries, separating them from the states and territories; that within those boundaries their authority is exclusive, except so far as they choose to relinquish it; that they own

Opinion of the Court.—Peck, J.

all the interior lands, and in their uninterrupted use it is the duty of the government to secure them; that the United States have the exclusive power to deal with them, which they not only may, but must exercise, which therefore, they can neither delegate, nor be deprived of; and that commonly the tribes can deal with no other political power than the United States, and may accept no authority but its. Consequently the states and territories are totally excluded from the exercise of political power over the Indian country, either to regulate the intercourse of its subjects with it, or to extend its municipal authority into it. This disposes of the claim of taxing power in favor of the plaintiff. In view however of the importance of the subject it is desirable to develop its consideration further.

Pursuing the constitution and a treaty of the United States with certain Indian tribes, which latter established a boundary between that government and those tribes, congress passed the act of March 30th 1802, 2 U. S. S. at L. 139, which recognized that line, and provided for the regulation of trade and commerce with those tribes, and the preservation of peace on the frontier; also the amendatory act of May 6th, 1834, 3 Ib., 628: the boundary having been changed by intermediate treaties, congress passed the act of June 30th, 1834, 4 Ib., 729, which recognized the boundary as so defined, and provided for the regulation of trade and intercourse with the Indians, and the preservation of peace on the frontier; also the amendatory act of March 15th, 1864, 13 Ib., 29. These statutes treat all the lands, lying beyond those lines, as owned by the tribes, and designate them as Indian territory or Indian country. By these and other acts the United States have assumed, under the constitution, the exclusive regulation of all commerce with the tribes, whether residing on reservations, located within states and territories, or on lands lying without them.

From the first the government has recognized, as facts, that the North American Indian has persistently resisted the attractions of civilization, and adhered to the savage

Opinion of the Court—Peck, J.

state, as his normal condition ; that, saving a few and feeble exceptions, under civilistic influences and in contact with the civilized race he has rapidly deteriorated, been less governable, and has quickly disappeared ; a state of nature has apparently been more favorable to his enjoyment, control and preservation ; that it would be unlawful, impracticable and mischievous to attempt to impose on him the restraint of civilized life, or laws adapted only to a highly civilized condition ; and equally unwise to induce him to abandon his separate state for that of its subjects : that, while the door of civilization should be open to him, he should not be forced to enter. The better to satisfy this complex status of sovereignty, dependence and wardship occupied by the tribes toward the government, and accomplish the paternal policy thus put upon it to render justice, and exercise humanity toward the Indian, and to secure protection for the subject, the government has adopted and maintained, by treaty the reservation system ; a system which secures the completest practical separation of the tribes from the subjects ; and the former in the enjoyment of their independence, and of their native state, freely opens to them the door of civilization, supplies their wants, promotes the regulation of commerce with their country, and peace and order between them and the outside communities ; a reservation being a tract or district of country, set apart for the exclusive occupation of the given tribes, as a community separated from and independent of the communities, people and governments, which may surround it, as those surrounding communities, people and governments, are separated from it : the treaties keeping faithfully to the idea of the constitution, and dealing with the tribes as distinct sovereignties. The federal government provides an Indian agent, and other officers and servants, whom it maintains upon the reservation, but only for reservation purposes. The treaties usually confer upon the government the right to legislate for the wants of the tribes, and in that connection to regulate its internal police, but only within

Opinion of the Court—Peck, J.

the limits of preserved tribal organization; and in pursuance of this power it locates upon the reservation an Indian trader, and a military reservation. Thus the government occupies the reservation with the tribe; but, as the reservation is based upon treaty, only for treaty purposes, it equally follows that its officers and servants, as maintained upon it, are there simply under its authority and for its purposes, and that whatever political or municipal status they have while there, must be necessary by the treaty; hence there is no room within the reservation for any other political or municipal power.

We are to presume that the Indian reservation, described in the agreed facts, is a reservation established and maintained under this system: that the plaintiff, described in the agreement as residing on it as an Indian trader and a post trader, was there during the period in question in those capacities, in virtue of a power conferred upon the government in the treaty, creating the reservation, to legislate for the wants of the tribe: we are also to presume that the general government has no power to enter upon it, except for reservation purposes, and that the political and municipal status of all its officers, agents and servants, who are located there in accordance. If the municipal power of the territory could tax the plaintiff in one particular, it could tax him in another; if it could tax his property, it could tax his poll; if it could tax his property, it could tax his official licenses: as the taxing power is unlimited, it could exhaust his assets. If that power could tax one party, placed, stationed or resident, upon the reservation under the treaty, it could tax any other party, so placed, stationed or resident there; every military officer, private soldier, other federal agent or servant, or Indian in respect to poll, property and industry. The taxing power stands upon a principle, which embraces all municipal authority. If that authority could extend itself over the reservation in one particular, it could extend itself over it in every other particular: it could carry over it its Sunday, its sumpuary, its sanitary, its militia,

Opinion of the Court—Peck, J.

and its police regulations : its entire civil and criminal jurisdiction. To extend its laws, is to enforce them, for the two things are impossible : to enforce them, all the machinery of the territorial courts apply to those so within, as to those who are without the reservation ; to enforce them, the original, the mesne, the final process of the courts may be employed ; and to execute them, the *posse comitatus*, and, as a part of it, the territorial militia may be sent into the reservation : the federal power must stand aside, and be as nothing. The result is that the reservation becomes dependent upon the irresponsible will of the territorial government, may be broken up by it, is a mere fiction. Such a power, because its insatiable tendency would be to strip the tribe of its reservation and its nationality, to usurp the status of the general government towards the tribe, nullifying its power over, and its duty towards it, we regard as utterly inadmissible, whether the treaty does or does not assume to allow it. But what is this treaty ? It was made on the 3d day of July, 1868, with the eastern band of Shoshones and the Bannock tribe of Indians, and ratified on the 16th day of February, 1869. The organic act of the territory was approved on July 25, 1868 : it is subject to the treaty, because the treaties of the United States control its statutes, because the Constitution speaks its supremacy through the treaties : and the clause in its first section, "that nothing in the act shall be construed to impair the rights of person or property, now pertaining to the Indians in the territory," is declaratory and superfluous. Following the constitutional idea, it fully answers to the threefold relations existing between the government and the tribes. It is entitled a treaty : it is a treaty, not a law : it deals with them as independent powers, not as subjects : its first and fundamental provision is for the existence of permanent peace between the parties : throughout each deals with the other as equals—as politically contracting parties. It provides, that, if any outside person, a subject of the United States, shall commit injury to the person or property of an Indian,

Opinion of the Court—Peck, J.

that government will cause the offender to be punished according to its laws, and will reimburse the Indian for the loss, thus becoming responsible to the Indian for the conduct of its subjects: that, if the Indian commits injury to the person or property of such subject, it shall be remedied before the Indian Commissioner, and by a method of procedure and form of satisfaction, which are especially prescribed in the instrument: that the tribe shall occupy the reservation as its permanent home, and in common, but that individual members of it may, in a given mode, acquire lands within the reservation for farming purposes as exclusive owners and settlers, the lands, so settled, to stand as taken out of common: that the cession of no part of the reservation should thereafter be made except by treaty: and that the United States should have full power to legislate as to government of the Indians upon the reservation, including the internal police thereof, the alienation and descent of property between them, the protection of the rights of such as should settle upon lands for farming purposes, and the fixing of the character of the settler's titles. It requires the United States to maintain upon the reservation, mechanics of various crafts, also physicians and teachers, who are to reside upon it, together with corresponding mechanical improvements, also a school and mission house—all to promote the general purpose of a reservation: it also requires the government to maintain upon it an Indian agent, who shall reside there, and have the general care of the tribes. It appears by the agreement and is distinctly stated to us by the counsel on both sides that the military was a part of the general reservation, attached to it for the more efficient performance by the government of its treaty duties: hence it was simply an incident to the latter, and took its character from it; and was established, and the plaintiff, as Indian and post trader, located there under the legislative power conferred by the treaty. The instrument in effect reaches the mechanics, physicians, teachers, the Indian agent and the trader agents of the government upon the general reserva-

Opinion of the Court—Peck, J.

tion. The second article, designating the limits, declares, "and the same is set apart for the absolute and undisturbed use and occupation of the Shoshones Indians, herein named, and for such other friendly tribes and Indians, as from time to time they may be willing, with the consent of the United States, to admit amongst them." This absolute use and occupation can mean no less than a complete and exclusive, and thus an undisturbed use and occupation; but, if they are to be exposed to the municipal authority of a government, which is neither a party to the treaty, nor responsible for its obligation—and which is susceptible to indefinite expansion and changes within its organic law, an authority, which in such sense is unrestrained and irresponsible—that use and occupation is not absolute and undisturbed, but is altogether subjective, open to endless perturbations, shifting and uncertain in continuation; the article declares that "no person, except those designated in the treaty, and such officers, agents and employés of the general government, as may be authorized to enter upon it in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside within the reservation." This article is of itself conclusive against the taxing claim. The ruling purpose of the treaty is to secure to the tribes a separate country, wherein to maintain their sovereignty, and to govern themselves after their own laws, subject to relations with no power other than the United States, and those only which the instrument defines. This idea reciprocally binds the parties: as the tribes can deal with no other political power than that government, so the latter can delegate no power, which the instrument confers upon it. It places the tribes, as dependent sovereignties, under the protection of the government; and, to secure the protection, specifies certain provisions, and confers a general power of legislation. The provision for peace, involving, as it does, the power to enforce it by arms, the other specific provisions, and the general provisions are intended to prescribe all the relations, that are to exist between the parties: while they prohibit re-

Opinion of the Court—Peck, J.

Indian from being a suitor in a court without the reservation, nor exempt him from the service of the process of such court, when made upon him without the reservation, they are plainly intended to supply all the law, which is to operate within the reservation. To open it to the municipal power, is to open it to the political power of the territory, from which the former emanates, and by which it is directed: which is to let that political power completely override the treaty.

It is clear that by the constitution, the acts of congress, and the treaty that the reservation, geographically within, is municipally without the territory of Wyoming; that the residents of the former are non-residents of the latter; consequently that neither the territory, nor any of its subordinate municipalities can have a taxing power within, because neither can send its taxing officers into the reservation. We should unhesitatingly have arrived at this conclusion, unaided by adjudication; but it is sustained by the cases of *Jackson v. Graham*; *Lapeer v. McIntosh*, 8 Whea., 573; *The American Fur Co. v. The United States*, 2 Pet., 358; *The Cherokee Nation v. Georgia*, 5 Pet., 1; *Wooster v. Georgia*, 6 Pet., 514; *United States v. Rogers*, 4 How., 570; *Fellows v. Blacksmith*, 19 How., 366; *United States v. Holliday*, 3 Wall., 409; *The Kansas Indians*, 5 Wall., 737; *The New York Indians*, 5 Wall., 767; *United States v. Forty-three Gallons of Whiskey*, 3 Otto, 188; *Bates v. Clark*, 5 Otto, 204. No principle could be more explicitly presented, or steadfastly maintained by any court, than this one has been by the supreme court of the United States. In *The United States v. Rogers*, Taney, C. J., delivering the opinion, said: "The native tribes, who were found on this continent at the time of its discovery, have never been acknowledged or treated as independent nations by the European governments, nor regarded as owners of the territory they respectively occupied. On the contrary the whole continent was divided and parcelled out by the governments of Europe, as if it had been vacant and unoc

Opinion of the Court—Peck, J.

cupied land, and the Indians continually held to be, and treated as subjects to their dominion and control." This is the only hint of the kind in that court upon the subject.

This remark of the judge is in direct conflict with the principle, as recognized by the Crown, the United Colonies and the Confederation; in direct conflict with the constitution, statutes and treaties of the federal government, including its numerous treaties with the Cherokee Nation, under which it held its Georgia reservation; also its treaty of New Echota of 1830, 7 U. S. S., at section 478, with that nation, under which it accepted its Arkansas reservation, in lieu of its former one—the very treaty, which was under consideration in the case. So long as our government defines its dealings with the tribes by the terms "compacts," "treaty," "trade," "intercourse," "commerce," and the like, it is concluded from saying that those tribes do not own their unrelinquished soil, and with the soil its political incidents. The remark of the judge was also in direct conflict with the principle, on which the *Rogers* case was decided, and foreign to its point. The defendant was indicted under the 25th section of the statute of June 30th, 1834, for murder, as committed by him, a white man, upon another white man in the Cherokee Indian county in Arkansas: he plead to jurisdiction that, before the alleged murder he was a citizen of the United States, had renounced his allegiance to it, removed to the Cherokee country, and became a Cherokee Indian and a member of the Cherokee nation by incorporation into it,—and was such member and Indian, and, as such, domiciliated in that country, when the alleged offense was committed; and that the party, on whom it was committed, was in like manner then a member of that nation, a Cherokee Indian, and there domiciled. By this plea the case came before the supreme court of the United States. That court assumed the validity of the statute, held that the act conferred jurisdiction, and that the plea was bad. To treat the act as valid, was to recognize its principle. The plea, conceding the principle, sought

Opinion of the Court—Peck, J.

to take the case out of the operation of the 25th section, under its provision that it should “not extend to crimes committed by an Indian against the person or property of another Indian.” The court very clearly held that the exception was confined to Indians, who were such by race, otherwise it would invite into the Indian country the very element of the whites, most calculated to promote discord, and to defeat the policy of the act. The court further held that a saving clause of the treaty of New Echota left the 25th section in full force. To recognize the proviso of the section, was to recognize a distinction between the relation to the United States of the Indians, and the relation to it of its subjects. To hold that the operation of the section was saved by the treaty, was to hold that its operation might have been cut off by the treaty—a thing impossible in law, unless the Cherokee nation was an independent contracting power; for, had the treaty cut off the section, it would have been because that action was reserving an exclusive right, not the United States relinquishing a supreme jurisdiction. The adjudications of that court are over imperative rule: but, to know what to obey, we must understand what has been decided: hence our necessity to discriminate, in the application of its opinions, between what it intends and what it does not, between decision and dictum. In *Wooster v. Georgia*, the Cherokees occupied a reservation, set apart for their separate use in that state by treaty between them and the United States. The entire treaty recognized the separate sovereignty of these Indians, and their dependence upon the general government in the senses which are explained above: declared that no persons should reside, or enter upon the reservation, but those designated in the treaty, and such others as the Indians might admit with the consent of that government: under that consent *Wooster* became a resident upon it, as an Indian missionary, and was so residing, and was there in that capacity, when indicted and arrested, as is hereinafter mentioned: On December 22, 1830, the state passed an act,

Opinion of the Court—Peck, J.

declaring that no white person should reside upon the reservation without a special permit issued by or under the governor of the state, and taking a prescribed oath to the state; and provided for the stationing of guards within the reservation to arrest violators of the statute. Wooster was indicted in a Georgia court, arrested and convicted under the act, and sentenced to four years confinement in the state penitentiary. The supreme court of the United States decided that the Georgia statute was repugnant to the sovereignty and independence of the Cherokees, to the act of congress, to the treaties under which they held the reservation, and to the federal constitution, which operated through them, and made them exclusive and supreme: that the reservation was extra-territorial as to Georgia, and that its process could no more be executed in the reservation, than it could be in another state. Delivering the opinion, Chief Justice Marshall said: "The Cherokee nation then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and the nation is your constitution and laws vested in the United States." He further said: "Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear, when the judgment offsets personal liberty. The plaintiff in error is not less interested in the operation of this unconstitutional law, than if it affected his property. He is not less entitled to the protection of the constitution, laws and treaties of his country." The analogy suggested by this last remark is realized in the case now before us. The collection of the taxes from the plaintiff was in its form more narrow and mild, but in its principle just as scopeful, illegal and mischievous, as was the action of the Georgia court towards Wooster. This

Opinion of the Court—Peck, J.

territory repeated what the United States supreme court held to be inadmissible in a state. The three several cases of the Shawnees, Weas and Miamis reported under the title *The Kansas Indians*, the Shawnees occupied a reservation in Kansas under a treaty with the federal government of November 2nd, 1854, 10 U. S. S. at L., 1063, which was silent as to liability for taxes under state laws. The case came before the United States supreme court upon a claim of power by the state to tax lands belonging to the reservation. In its decision the court said that, if the tribal organization was preserved intact, the Shawnees were a people distinct from others, separated from the jurisdiction of Kansas, and under the protection of the constitution, the laws of congress and treaties; and, until they were clothed with all the rights, and bound by all the duties of citizens of Kansas they enjoyed total immunity from taxation: the court held that the tribe had not abandoned its organization, and decided that, under the constitution, the power claimed by the state did not exist. The cases of the Wea and Miami tribes, which occupied several treaty reservations in Kansas, involved the same question, and were decided on the same principle. In the case of *The New York Indians* the court, following the principle of the Kansas Indians, decided that the attempt of the state of New York to tax the reservation lands, located in that state, and held by the Senecas under treaty, was unconstitutional. The defense has cited 1 Woolworth, 17; *United States v. Ward*; Ib., 192, *United States v. Stahl*, in support of its claim to tax. As these two cases were read to us upon the argument, we could detect nothing in their decision, which was adverse to our views; but we do not look into them to see whether they accord with, or differ from the other decisions, above referred to; the decisions of an inferior court of the United States are not needed to sustain, and are not acceptable to overrule those of its supreme court. Both sides have cited state and territorial cases upon the subject; but, when a given point has been adjudicated by our appellate court, it

Statement of Facts.

would neither be decorous, nor permissible for us to consult state or territorial decisions relating to the point; we therefore decline to do it in this instance, and allude to those citations, simply to dismiss them from consideration.

When listed, the laws of the property was the reservation. It is not clear by the agreement but is rather its import that it was then actually there; but, whether all actually within the reservation, or apart temporarily beyond it and within the county at the time, is immaterial, because the *locus* governs.

Moore's voting as a citizen of Wyoming is immaterial. If he had not the right to vote, his voting did not confer the right, nor could confer the power to tax.

As the taxes were illegally collected, it follows that they must be restored by the county with interest from the several dates of collection, namely: \$116.39 with interest from October 8, 1873, \$93.43 with interest from September 25, 1874, \$232.25 with interest from November 10, 1875. The judgment of the district court is reversed; and it is directed to proceed with the case according to the opinion.

Judgment reversed.

McLAUGHLIN v. UPTON, ASSIGNEE.

APPLICATION FOR NEW TRIAL—EXTENSION OF TIME.—Sec. 308 of the Civil Code, provides, that the application for a new trial must be made at the term at which the verdict is rendered, and except for the cause of newly discovered evidence, within three days after the rendition of the verdict, "unless unavoidably prevented." *Held*, that this provision is directory merely, and that the matter of extending the time in which to make the application is within the discretion of the district court.

A motion to dismiss the writ of error in the supreme court on the ground that the time for making the application for a new trial was extended beyond the three days, denied.

Opinion of the Court—Peck, J.

ERROR to the District Court of Laramie County.

Motion to dismiss the writ of error upon the following grounds, 1st, because no motion for a new trial was filed in the court below as required by law; 2d, because the errors complained of in the petition in error, were not first presented to the court below by a motion for a new trial in compliance with law and the rules governing the practice of this court.

E. P. Johnson, for the motion.

W. R. Steele, contra.

PECK, J. The transcript states that on the 15th day of December, 1876, a verdict was returned for the plaintiff below, the defendant here; that on the 18th day following the district court, for good cause shown, made this order in the case: "On application of Thomas J. Street, of counsel for defendant, it is ordered by the court that the time for filing the motion to set aside the verdict and grant a new trial herein be extended until the end of the present term of this court;" that on the 16th day of February, 1877, the defendant filed a motion to set aside the verdict and for a new trial; and that all these proceedings took place at the November term for 1876 of that court. Upon this state of the record the defendant in error moves to dismiss the appeal upon a single ground, stated in two forms, and as follows: first, because no motion for a new trial was filed in the court below, as required by law; secondly, because the errors, complained of in the petition in error, were not first presented to the court below by a motion for a new trial in compliance with law and the rules governing the practice of this court. This involves the consideration of section 308 at page 72 of the Compiled Laws, which declares that the application for a new trial must be made at the term at which the verdict is rendered,

and, except for the cause of newly discovered evidence, within three days of the rendition of the verdict, "unless unavoidably prevented." What constitutes such prevention, must be of course for the district court, if for any one, to decide. Whether in this action a motion for a new trial was requisite to the basis of an appeal, we do not look into the transcript to see. For the purpose of disposing of the motion to dismiss, it is sufficient that the plaintiff in error treated it as requisite, and we therefore assume that it was. Whether section 308 is jurisdictional, or a merely conditional limitation of the discretion of the district court, or is simply a directory provision, it is unnecessary for us to decide, and we do not decide. It is however clearly one of these: but, whichever it is, the defendant in error is not in an attitude to complain of the action of the court below in extending the time for filing a motion for a new trial.

Treating the provision as jurisdictional: if the district court exceeded its jurisdiction, and this appeared in the transcript, that fact would *per se*, that is, by operation of law, raise an exception, and bring the error before this court, without a formal allegation of error, because want of jurisdiction is a want of power, and a powerless act is a void act, and this court would be compelled to recognize and to treat the fact accordingly. But, for this purpose, the fact must appear in the record; for, if it does not, how stands the matter? The court below had general jurisdiction; before passing the order, it had acquired jurisdiction of the subject-matter and of the parties. Having that jurisdiction, its subsequent action must be regarded as jurisdictional, unless the contrary appears. Hence, were the record silent as to the ground of granting the motion for a new trial, we would be compelled to presume that it granted the motion jurisdictionally. But the record is not silent as to the ground; it states that the motion was granted for "good cause:" it was good cause, if it was the cause specified in the statute, and we must take the record of that court, that it had such cause, else we violate

Opinion of the Court—Peck, J.

the presumption, which is a rule upon us in the interpretation of the records. Hence the party who comes here to complain of an excess of jurisdiction, as committed by the court below, must present to us a record, which affirmatively shows it. Any other principle would deprive the records of a court of general jurisdiction of all stability, or force them into the most burdensome and inconvenient prolixity.

Treating the section as a merely conditional limitation of the discretion of the district court, two things are necessary to bring before this court a violation of the condition of that court; one, that the violation should affirmatively appear in the record, the other, that it should be complained of, if an error of law, by a formal exception taken below. The record is silent in both these particulars. If such error was committed, this defendant could have made the record speak it, and his exception to it; because the motion for an extension was *ex parte*, and belonged to that class of applications, which may be made *ex parte* and orally: when granted, the record was notice to the defendant, and it then became his right, by a written and noticed motion with affidavits, to ask for an order vacating the order of extension. That would have spread the merits of the order upon the record, and a denial of the motion would have secured to him an exception to whatever error of law was committed by the district court in the matter; and the exception having been taken and appearing in the record, that error of law would have been presented to this court for revision.

Had the error been of fact, and the facts and a formal exception appeared in the record, it would be our duty to revise it under section 2 at page 597 of the Compiled Laws, which declares that "in all cases, brought into the supreme court by writ of error or petition in error, the court is required to revise and correct all rulings of the district court, made during the progress of such cases therein, upon all questions, whether resting for their decision in the discre

tion of the court or otherwise." But, if the error of fact did appear, but no exception to it appeared in the record, whether it would not still be our duty to revise, there may be a doubt; and the doubt is suggested by the fact, that this section puts an unlimited revisory power upon this court. Section 290, page 71 defines an exception to be an exception for error in law, and the statutes define no other exception, leaving it open to the question, whether any formal exception is necessary to set in motion our revisory power under section 2 at page 597, except in case of an error in law. The record however is destitute of the facts which are necessary to raise this question, and we do not decide it. We deem it proper however to say that, if compelled to decide it, we should hesitate to the last to yield to the doubt, for to do so, would be to open our door to the most trivial and petty appellate litigation.

Treating section 308 as a simply directory provision, the motion to dismiss is, upon its own theory, not well taken. Upon every ground the motion must be and is denied.

CASES
 ARGUED AND DETERMINED
 IN THE SUPREME COURT
 OF THE
 TERRITORY OF WYOMING.
 MARCH TERM, 1879.

McLAUGHLIN *v.* UPTON, ASSIGNEE.

BANKRUPTCY.—The object of the bankrupt act is to secure to creditors the largest benefit of a common fund, by speed and economy in the administration of it.

LIMITATIONS.—The clear intention of the act was to impose two years as the absolute limit to the capacity of the assignee, within which to sue or be sued,—and this in order to promote dispatch in the liquidation of the bankrupt estate by avoiding the indefinite, wasteful, and vexatious delays, which would be necessarily consequent upon the power of waiver, was the act a limitation of the remedy alone. Hence, after the two years, for all the purposes of suit being commenced by or against the assignee, his office has expired and his existence ceased.

JURISDICTION.—As the assignee is powerless to acquire, so the court is powerless to admit him to a status within the court. This want of power is want of jurisdiction. Want of jurisdiction is a radical, and therefore incurable defect. The parties cannot waive, nor can the court ignore it. A court does not create its jurisdiction: it must accept and confine itself to what is created for it: hence *ex necessitate* such defect of jurisdiction carries its object with it; appearing in the case, it is the imperative duty of the court, of its own motion, to treat the proceedings as null and to dispose of them accordingly.

ERROR to the District Court of Laramie County.

The plaintiff in error was a subscriber to ten shares of the capital stock of the Great Western Insurance Company, of Chicago, Illinois, upon which he had paid twenty per cent. The original suit was brought by the assignee to recover the amount unpaid on the par value of the stock. The petition in the court below, alleged that the defendant was a subscriber for ten shares of the capital stock of the

Statement of Facts.

Great Western Insurance Company, of the par value of one hundred dollars per share, that he had paid upon the same twenty per cent., or two hundred dollars, that there was remaining due and unpaid on said ten shares of stock, eighty per cent., or eight hundred dollars, with interest. That the Great Western Insurance Company had become bankrupt and unable to meet its liabilities, and had been duly adjudicated a bankrupt by decree of the U. S. district court of the northern district of Illinois, that on the 11th day of April, A. D. 1872, the plaintiff, Clark W. Upton, had been duly appointed assignee of said bankrupt, and on that day the deed of assignment had been executed to him.

That by order of the court in which the bankruptcy proceedings were pending, an order was made that the balance due on the stock should be paid in by the stockholders to the assignee on or before the 15th day of August, A. D. 1872.

That notice had been served upon defendant to pay the balance unpaid on the stock held by him, to the plaintiff as assignee, but that defendant had failed to pay the same.

That the bankrupt corporation was largely indebted, had no assets save the amount due it from its stockholders, upon their unpaid stock, and that it was necessary to collect the amount due and unpaid upon such stock, in order to liquidate the liabilities of the bankrupt corporation.

The petition prayed judgment against defendant for the amount unpaid upon his stock, with interest.

The petition was filed in the court below, on the 8th day of April, A. D. 1876. The defendant, McLaughlin, answered, denying each and every allegation of the petition, except the allegations that the Great Western Insurance Company was a corporation as alleged, and it had been adjudicated a bankrupt, and that the plaintiff, Clark W. Upton, had been appointed assignee, and the allegation that the defendant was a resident of Wyoming Territory. Defendant specially denied that he was indebted to plaintiff, or to the Great Western Insurance Company in any manner or in any sum whatever. Defendant also alleged that

Statement of Facts.

he entered into a written contract with the Great Western Insurance Company, to purchase ten shares of its capital stock, at and for the sum of two hundred dollars, which amount he had paid by the 19th day of August, A. D. 1871.

Defendant further alleged that at the time of entering into the contract of subscription for said shares of stock, he was a resident of the Territory of Wyoming, and was not bound to know and did not know the laws of the state of Illinois, under which the Great Western Insurance Company was organized. That the Great Western Insurance Company represented to defendant, at the time he subscribed to said ten shares of stock, and entered into the contract with said company, that the said shares of stock would be forever non-assessable, and that the defendant would never be liable or be called upon for any other sum of money, under said contract and said ten shares of stock, than said sum of two hundred dollars; that relying upon such statements and representations, and believing the same, the defendant entered into said contract. That such representations of the Great Western Insurance Company made to induce the defendant to enter into said contract, were false and fraudulent when made, and have ever since so continued, and were known by said Great Western Insurance Company to be false and fraudulent when made.

And as a cause of action and offset against the plaintiff, the defendant alleged that the Great Western Insurance Company, before it was adjudicated a bankrupt, was indebted to him in the sum of \$341.25 upon account, with interest since September, 1872, for which amount he prayed judgment. The plaintiff below demurred to the second, third and fourth defenses set up in the answer. The court overruled the demurrer to the second and third defenses in the answer, and sustained it as to the fourth.

The case was tried by a jury.

Upon the trial of the cause, the plaintiff below offered in evidence a copy of the charter of the Great Western Insurance Company. To the admission of which, in evidence, the defendant below objected as irrelevant, incompetent and

Statement of Facts.

immaterial: the objection was overruled. The plaintiff also offered in evidence the record of proceedings to increase the capital stock of the Great Western Insurance Company, which was objected to by the defendant, and the objection overruled. The plaintiff offered in evidence the certificate of the auditor of state of the state of Illinois, authorizing the Great Western Insurance Company to do business. Also the petition for adjudication and rule to show cause in bankruptcy proceedings against the Great Western Insurance Company and order of appointment of the assignee. Also the order of adjudication of bankruptcy. Also the notification of appointment of assignee, and acceptance. Also the deed of assignment to assignee. Also the call upon the stockholders for balance due upon stock. Also the call upon stockholders by the assignee, and proof of publication of the same by the certificate of publication.

Plaintiff also offered in evidence the statutes of the state of Illinois, known as Gross Statutes of Illinois, and a copy of the stock ledger of the Great Western Insurance Company. All of which was objected to by the defendant, and objections overruled.

The plaintiff below called the defendant, D. McLaughlin, as a witness, and examined him as to the entering into the contract of subscription for the ten shares of stock of the Great Western Insurance Company, introducing in evidence the bond or contract entered into by said defendant. Upon cross-examination, the witness, McLaughlin, was asked to state the circumstances under which he signed the bond or contract; to which plaintiff below objected as immaterial and irrelevant, which objection was sustained by the court. And the defendant then and there excepted.

The plaintiff below offered in evidence a copy of the notice of stock assessment by the assignee, to the introduction of which in evidence the defendant objected as irrelevant, incompetent and immaterial; and upon the objection being overruled, excepted.

Upon the part of the defendant, and to maintain the issues presented by the answer of defendant, the defendant,

Argument for the Plaintiff in Error.

Daniel McLaughlin, was called as a witness, and was asked to state all the facts and circumstances connected with his signing the bond No. 1880, and its delivery to the Great Western Insurance Company; what statements and representations, if any, were made to him by the company relating to the subject matter of said bond; to which plaintiff objected as immaterial and irrelevant, which objection was sustained by the court, to which ruling the defendant excepted.

The defendant was also asked as a witness to state what, if anything, occurred between him and the Great Western Insurance Company, after the return of his bond and prior to the bankruptcy of said company, relative to its attempt to levy an assessment upon his stock; to which plaintiff objected as immaterial and irrelevant, which objection was sustained by the court, to which the defendant excepted.

The jury found for the plaintiff below

W. R. Steele, for plaintiff in error.

The cause of action alleged was one existing in favor of the defendant and against the assignor, before the bankruptcy of the assignor. The assignee succeeds only to the rights of the assignor, and there may be a set-off of mutual debts existing at the time of bankruptcy. Revised Statutes of the U. S., secs. 5046, 5047, 5073; Code of Civil Procedure, Wyoming, sec. 97; *Tucker v. Oxley*, 5 Cranch, 34; *Hade v. McVey et al.*, 31 Ohio State, 231; *American Bank v. Wall*, 56 Maine, 167; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444; *Colt v. Brown*, 12 Gray, 283; *Holbrook v. Receiver Amer. Fire Ins. Co.*, 6 Paige, 220; *Olive, Assignee v. Smith*, 5 Taunton, 66.

The court erred in admitting the certified copy of the charter of the Great Western Insurance Company. It was neither the original charter of the company, nor a copy authorized to be used as evidence by the laws of Wyoming. Compiled Laws of Wyoming, p. 245, article 4.

It was competent for the legislature of Wyoming to prescribe the rules of evidence in its courts, as well as to reg-

Argument for Plaintiff in Error.

ulate the rights of foreign corporations doing business in the territory. *Inn v. Comstock*, 3 Sawyer, C. C. Repts., 218

The record of the proceedings to increase the capital stock of the Great Western Insurance Company was improperly admitted, for the reasons stated *supra*, and that they were incompetent, irrelevant and immaterial.

The court erred in the admission in evidence of the annual statement of the condition of the company, by the auditor of the state. It was incompetent, irrelevant and immaterial. The court erred, in admitting in evidence the certificate of the auditor of public accounts of the state of Illinois authorizing the Great Western Insurance Company to do business. It was incompetent, irrelevant and immaterial, and was not properly authenticated. Revised Statutes of the U. S., sec. 906.

The court erred in admitting in evidence the petition and rule to show cause in the bankruptcy proceedings against the Great Western Insurance Company. The evidence was incompetent, irrelevant and immaterial, and tended to prove no issue in the cause.

The court erred in admitting in evidence the certificate of appointment of Clark W. Upton, assignee; the adjudication of bankruptcy of the Great Western Insurance Company; the notification of the appointment of the assignee and his acceptance. The evidence was incompetent, irrelevant and immaterial, and tended to prove no issue in the cause.

The court erred in admitting in evidence the deed of assignment to the plaintiff below, as assigns of the Great Western Insurance Company. It was incompetent, immaterial and irrelevant. And when offered in evidence, disclosed that the authority of the assignee to maintain any action had expired. Revised Statutes of the U. S., sec. 5057.

The objection was in the nature of a demurrer, *ore tenus* to the petition. *Curtis v. Cutler*, 7 Nebraska, 315.

The court erred in admitting in evidence the call upon the stockholders made by the court, and also the call made by the assignee upon the stockholders. The evidence was incompetent, immaterial and irrelevant, and it had been

Argument for Plaintiff in Error.

shown by the deed of assignment already in evidence, that the assignee, plaintiff, had no right of action against the defendant.

The court erred in admitting in evidence the copy of the published call upon the stockholders, for the reasons stated *supra*, and because there was no proper proof of publication; such publication is a fact to be proven by the ordinary rules of evidence. There is no rule of evidence authorizing such proof to be made by the certificate of the publisher of a newspaper.

The court erred in admitting in evidence Gross' Statutes of Illinois, and the copy of stock ledger of the Great Western Insurance Company, for the reason stated *supra*, and also that the proper foundation for their introduction had not been laid.

The court erred in refusing to allow the defendant to testify as to the circumstances under which he signed the contract or bond to the Great Western Insurance Company, when called as a witness by the plaintiff to prove his signature. If the plaintiff saw fit to call the defendant, as a witness to prove that defendant signed the paper; then it was proper and legitimate cross-examination, to show under what circumstances the defendant entered into the contract.

The court erred in instructing the jury that if the plaintiff had established certain facts they must find for the plaintiff when this instruction was given; the evidence of the plaintiff established that he had no power or right to maintain an action in any court, and the jury should have been so instructed. The foregoing proposition, and the error assigned in refusing a new trial, for the reasons that: The verdict was not sustained by sufficient evidence; and that: The verdict was contrary to law, may be considered together.

Sec. 5057, Revised Statutes, U. S., is as follows: "No suit either at law or in equity, shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to, or vested in such as-

Argument for Plaintiff in Error.

signee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

This provision of the statutes, is not a mere limitation upon the remedy, it is an extinction of the right. Congress had undoubted power in passing the bankrupt act, to provide what courts should have jurisdiction, what rights the assignee should have, and for what time such rights should exist.

The right of the assignee was a statutory right, and his exercise of that right within the time fixed by statute, was a condition precedent to its exercise at all. *Pittsburgh etc. Company v. Hine*, 25 Ohio State, 629.

The statute not only affected the right of the assignee, but also the jurisdiction of the court. The language of the statute is: "No suit shall be maintainable in any court."

This language is comprehensive enough to deprive any court of the power to exercise jurisdiction in any action brought by an assignee, after the expiration of two years from the accruing of the cause of action in his favor.

Webster defines maintainable, "capable of being maintained, sustainable." Worcester's definition is, "that may be maintained, tenable, that may be supported by argument."

Under an "act requiring compensation" for the causing of death by wrongful act, neglect or default, which gave a right of action, provided such action shall be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action and not a mere limitation on the remedy. *Pittsburgh, etc. Railway Co. v. Hine*, 25 Ohio State, 629. The law never deliberately takes away all remedy, without an intention to destroy the right. *Moore v. Luce*, 29 Pa. State, 280; *Leffingwell v. Warren*, 2 Black, 599.

The liability of stockholders upon their unpaid subscriptions is that of debtors, and passed to the assignee. *Terry v. Anderson*, 5 Otto, 636.

The cause of action accrued to the plaintiff below, as assignee upon the 11th day of April, A. D. 1872, the date upon which the deed of assignment was executed to him by

Argument for Defendant in Error.

the register in bankruptcy. *Foreman, assignee v. Bigelow*, Central Law Journal, vol. 9, No. 22, p. 430.

The cause of action in favor of the plaintiff below, was barred by the provisions of the bankrupt law, limiting the right of the assignee to sue. *Walker, assignee v. Tower*, 4 Dillon C. C. Repts., 165; *Payson, assignee v. Coffin*, 4 Dillon C. C. Repts., 386; *Bailey, assignee v. Glover*, 21 Wallace, 342; *Cogdell v. Exum*, 12 Am. Repts., 656; *Foreman, assignee v. Bigelow, supra*.

The provision of section 5057, of the Revised Statutes of the United States, is, that no action shall be maintainable in any court, by an assignee, unless brought within two years from the time when the cause of action accrued for such assignee; this provision is essentially different from the ordinary statutes of limitation, which provide: That actions can only be brought within certain periods, after the cause of action shall have accrued. The language of the United States statute is equivalent to saying: That no court shall entertain jurisdiction of any cause, unless it be brought within two years after it shall have accrued to the assignee. Where it appears upon the face of the record that the court has no jurisdiction of the cause, the failure to set up the want of jurisdiction by plea is no waiver of the objection. *Steamboat Buell v. Long*, 18 Ohio State, 521; *Hughey v. Sidwell*, 18 B. Monroe, 529; *Thompson v. Steamboat, etc.*, 2 Ohio State, 28. If a court has no jurisdiction of the subject-matter of a suit, consent of parties can never give it. *Lee v. Mason*, 1 Scammon, 249. A plaintiff may assign for error, want of jurisdiction of the court in which he instituted his action. *Capron v. Van Noorden*, 2 Cranch, 126.

Johnson & Potter, for defendant in error.

This case presents the simple question: Whether a stockholder in a bankrupt corporation is liable to the assignee in bankruptcy, for the unpaid balance due on stock held by him, even though, by agreement between company and stockholder, the stock was non-assessable

Argument for Defendant in Error.

after payment of a certain per cent. of the face or par value?

The errors complained of in the ruling upon the demurrer to the fourth defense, in the answer, and on all offers of testimony to sustain that and the third defense, are obviated by the consideration that, the demurrer to both defenses should have been sustained, as neither constitute a defense; and if so, it was not error to exclude testimony to sustain them, nor to instruct the jury to that effect. *Hitchcock v. Rolls*, 3 Biss.cc., 276; *Sawyer v. Hoag*, Id., 293; *Upton v. Hansbrough*, Id., 417; *Upton v. Burnham*, Id., 481; *Upton v. Burnham*, Id., 520; *Upton v. Tribilcock*, 1 Otto, 45; *Sanger v. Upton*, Id., 56; *Webster v. Upton*, Id., 64; *Chub v. Upton*, 5 Otto., 665; *Pullman v. Upton*, 6 Otto, 328.

The second defense of the answer, and McLaughlin's testimony and his stock certificate, admitted his position as a stockholder, the existence and bankruptcy of the corporation, etc., and rendered the previous testimony, to establish those facts, unnecessary, and renders nugatory any attempt to found rights or wrongs on alleged errors concerning the same. Opinion in *Chub v. Upton*, 5 Otto, 669.

The verdict is presumed to be supported by evidence, unless the record purports affirmatively to contain all the evidence in the case. This record, on the contrary, affirmatively shows it does not. *Powell on App. Pr.*, sec. 7, p. 213.

Under authorities heretofore cited, settling the law on this whole question, the court could properly have charged the jury to find for plaintiff, leaving to them the assessment of damages, under proper instructions as to the measure.

According to the established practice of this court, only such questions will be reviewed as were presented to the court below by motion for new trial, properly filed, as required by law. In this case, there being no such motion, the court did not err in overruling or ignoring it. *Markwood & Niman v. Doriat*, 21 Ohio St., 687; *McKillop v. Empire Mills*, 2 Nov., 34; *Bear R. & A. M. Co. v. Boles*, 24 Cal., 354; *Coney v. Silverthorn*, 9 Cal., 67; *Mahon v.*

Cox, 15 Cal., 313; *Ellsasser v. Hunter*, 26 Cal., 279; *Boardman v. Beckwith*, 18 Iowa, 292; *Odell v. Seargent*, 3 Kans., 80; *Most v. Parkhurst*, 2 Hill, 372; *Wells Fargo v. Preston*, 3 Neb., 446; *Fox v. Meacham*, 6 Neb., 531; *Harris v. Ray*, 15 B. Monroe, 628; *Duffy v. Moran*, 12 Nev., 94; *Waite v. Van Allen*, 22 N. Y., 319; *Salles v. Butler*, 27 Id., 638; *Campbell v. Jones*, 41 Cal., 515; *Cattle v. Litch*, 43 Id., 320; *F. Cumming v. Hartford Fire Ins. Co.*, C. L. J., Nov. 23, '77; C. L. J., Jan. 29, '79.

PECK, J. It appears on the part of the assignee the plaintiff below, that on the 14th day of February, 1871, the company made a contract dated on the 6th of the month, with McLaughlin, of the sale to him of ten shares of its unpaid capital stock of the par value of \$1,000; for the consideration of \$700, in full: that in pursuance of the contract the ten shares were delivered on its execution, and \$200 paid by the 19th day of August following. The suit is to recover upon the contract \$800, the balance of the par value of the ten shares, as a balance due by the contract, and interest. Whether the district court having jurisdiction the assignee could recover upon that contract, as for a balance and its interest; or in order to recover, should have rescinded the contract, as void (for fraud) against the company, and have sued for damages committed by the fraud, which consisted of that transaction, and of which the instrument of February 6th was but an element, are questions, that we do not consider, because of our conclusions upon the antecedent subject of jurisdiction. If the court having jurisdiction, there is such right of recovery upon the contract, it arises by converting a contract, which in terms—and they are most explicit to that effect, because mutually executed on the payment of the \$200—into an executory contract against McLaughlin as to the \$800 and interest, and this to effectuate the principle, that the laws, which required the company to affix a par value to its stock, also forbade its parting with the stock, except for an actual and *bona fide* equivalent, so

as to protect creditors, by enabling them to rely absolutely upon its capital as actual not fictitious. The assignee treats the contract executory upon this principle, and seeks to recover upon it accordingly. Hence by the theory of the suit the alleged claim is for a balance of the price or value of unpaid stock, which balance if due at all, was due on the 14th day of February, 1871, when the stock was delivered, and therefore on the 11th day of April, 1872, when the assignee was appointed, 22 How., 380, *Ogilvie v. Knox Ins. Co.*; 5 Otto, 628, *Perry v. Anderson*. It also appears on the part of Upton that the bankrupt court on the 5th day of July, 1872, duly ordered this balance to be paid to him by August 15th, 1872, and that in pursuance of that order notice was given to McLaughlin on the 15th day of the same July. Therefore, whether the date, at which the alleged claim accrued to the assignee be treated as the date of his appointment, or the date designated in the order for payment, is immaterial to the enquiry whether the district court had jurisdiction of the suit, for in either view more than two years had expired before the maturity of the claim and his commencement of suit.

The bankrupt act of March 2, 1869, at sections 2 and 14, U. S. S. at L., 518, declares that "no suit at law or in equity shall in any case be maintainable by or against the assignee in bankruptcy, or by or against any person claiming an adverse interest towards any property or rights of property transferable to or vested in such assignee in any court whatsoever, unless the same be brought within two years from the time when the cause of action accrued for or against such assignee: provided, that nothing herein contained shall revive a right of action barred at the same time such assignee is appointed." The bankrupt acts of section 5057 of the U. S. Rev. Stats., declares, "that no suit in law or equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee unless brought

within two years from the time when such cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action, barred at the time, when an assignee is appointed." The sections are identical in substance. The statute creates an officer unknown, and for purposes unknown to the common law; what it creates, it can limit: the officer has his origin in the statute, his existence begins and ends in it, and his capacity is measured by it. The difference between the objects respectively aimed at by a statute of merely remedial limitations and the present statute, indicates the difference between the constructions which are to be applied to them. The former seeks to protect a party from an alleged liability upon a claim, that after a prescribed period is presumed to be fictitious, either because it never existed, or, if it did, has been satisfied; the latter to secure to creditors the largest benefit of a common fund, by speed and economy in the administration of it, the paramount importance of which purpose is peculiar to a bankrupt act is manifest from the indefinite variety, extent and complications of assets to be administered and of claims to be adjusted against them. The clear intention of the act in question was to impose two years as the absolute limit to the capacity of the officer, within which to sue or be sued,—and this in order to promote dispatch in the liquidation of the bankrupt estate by avoiding the indefinite, wasteful and vexatious delays, which would be necessarily consequent upon the power of waiver, were this provision a limitation of the remedy alone. The last clause of each section, namely, that it shall not in any case revive a right of action, barred when the assignee is appointed, completely matches this construction; and it would be inconsistent with the body of the act, were that to be construed, as a mere limitation upon the remedy, for thus it would in one breath forbid the revival of actions barred at the time of the appointment and permit the revival of whatever right becomes subsequently barred—a senseless incongruity. Hence, after the two years,

for all the purposes of suit being commenced by or against the assignee, his office has expired and his existence ceased. As he is powerless to acquire, so the court is powerless to admit him to a status within the court. This want of power is want of jurisdiction. We should not hesitate so to construe the statute were it to read: "no suit shall be commenced in any court," instead of, "no suit shall be maintainable in any court," as it now reads; "maintainable" signifies capable of being maintained; "not maintainable" incapable of being maintained. Declaring that no suit shall be capable of being maintained if commenced after the two years, or that every suit commenced after that period, shall be incapable of maintenance, the section declares that a suit so commenced, shall be a subject on which no court shall act, that is, shall be capable of acting. But the words, "not maintainable," are employed *ex industria*, intending to preclude all doubt, that might attend an implied construction, by inhibiting in express and explicit terms the officer and claimant from instituting suit after the prescribed period; and the courts from entertaining it, if instituted. This is the special function of the terms, "not maintainable," as employed in the context. They go beyond the parties, and reach the very jurisdiction of the court, defining it as to subject matter. This construction of the two years clause concurs with the unmistakable spirit and intent of the rest of the act; in its consistent and careful provisions for suits, summary hearings, compromise and other proceedings essential to the administration of the estate, it exposes the one general purpose of thrifty conversion and early distribution. The provision then which is under enquiry is jurisdictional; and a suit, instituted in violation of it, would be *coram non iudice* and void. Since reaching this conclusion, we have examined *Baily, Assignee in bankruptcy of Benjamin Glover v. Glover et als.*, 21 Wall., 342; we derived the impression at the hearing that the case expressed only a *dictum* in favor of this view; we find that it has a graver aspect. It was a

suit in equity brought by Baily against Elenor Glover and others in the circuit court of the United States for the southern district of Alabama, to vacate a conveyance of property, made by the bankrupt to the defendants in fraud of the act: it appeared by the bill that the assignee was appointed on the 1st day of December 1869, and brought the suit on the 20th day of January 1873; that the fraud was committed prior to the appointment, but kept secret by the parties to it from the assignee, so that he was prevented from discovering it until within two years next before the commencement of the suit; the defendants demurred, the demurrer was sustained by the court below, and the assignee appealed; the supreme court reversed with a modification sustaining the general principle of the decree below, simply modifying its application to the special features of fraud. The opinion of the court was delivered by Mr. Justice Miller; he says of the second section of the act of 1867, "this is a statute of limitations and is precisely like other statutes of limitations," and stopping at this remark a hasty conclusion would be that he was speaking of the statute as merely an act of limitation; upon the remedy it is however observable that the expression viewed literally does not indicate whether it referred to an act of remedial, or to one of jurisdictional limitations; the context, however, unmistakably indicates that it referred to the latter, and this we proceed to show. If a bar of limitations is simply remedial, it does not impair the right of action or defence, cannot be raised by demurrer, can only be raised by plea, and this whether the facts on which it is raised, do or do not previously appear in the record; if the bar of limitations is jurisdictional it does impair the right of action on defence, and may be raised by demurrer on motion, when the ground of the bar appears in the record; if the facts do not so appear, they must be pleaded in order to prevent the jurisdictional bar; this distinction between the several functions of a demurrer and a plea under a limitation act is a perfect key to *Baily v. Glover and others*, sufficing to

Opinion of the Court—Peck, J.

determine its scope as a decision. The demurrer was interposed upon the theory that the section prescribed a jurisdictional bar and that, in applying the bar, the time would be computed from December 1st, 1869, the date of the assignee's appointment, and not from the discovery by him of the fraud; the demurrer might have been overruled upon either of two grounds: one, that the bar was remedial, the other, that it was jurisdictional; but in applying it as such, the time would be computed from his discovery of the fraud; but the demurrer could have been sustained only upon the ground that the bar was jurisdictional. Now, how did the circuit and supreme courts treat this demurrer? The former sustained it on the ground that the time began with the date of appointment, and dismissed the bill. The latter sustained it with the modification already stated—having made the remark, "this is a statute of limitation, and is precisely like other statutes of limitation," Judge Miller proceeded as follows: "and applies to all judicial contests between the assignees and other persons touching the property or rights of property of the bankrupt, transferable to, or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. It is obviously one of the purposes of the bankrupt law that there should be speedy disposition of the bankrupt assets; this is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual methods of trial attended with some necessary delay. To prevent this as much as possible, congress has said to the assignee, you shall commence no suit two years after the cause of action has accrued to you, nor shall you be hampered when the cause of action has accrued more than two years against you; within that time the estate ought to be nearly settled up, and your functions discharged;" this policy of the limitation clause, and the

ground of it, as so explained by the court, are utterly incompatible with the idea that the bar is under the control of the parties, not of the court, and is compatible alone with the idea that it is under the control of the court and not of the parties; but, as if to put its view upon the subject beyond doubt the court concluded its explanation of the policy with the further remark, that by the two years clause congress declares, "we close the door to all litigation not commenced before that period has elapsed;" the conclusion is unavoidable, if the door may be closed or opened at the will of the parties, congress does not close it, and the section provides but a remedial limitation; if congress closes it the parties cannot open it, and the section imposes a jurisdictional limitation; therefore the supreme court fully sustained the circuit court, but following the analogy furnished by the practice under a remedial bar of limitations, further held that when it appeared that there had been no laches upon the assignee's part in hearing of the fraud, which was the basis of the action, and the fraud had been concealed, or was of such a character as to conceal itself from him, the statute did not begin to run, till it had been discovered by, or become known to him or his privies, and so reversed with directions to proceed accordingly; thus the supreme court decided that if the concealment of the fraud did not appear in the bill, the bar would begin with the appointment; that if it did so appear the bar would begin with the discovery, and if more than two years had elapsed between the commencement of the bar and the commencement of the suit, a demurrer would lie, and the bar be raised; and upon the invariable distinction between a demurrer and a plea, this was deciding that the second section of the act of 1867 prescribed a jurisdictional limitation. Hence, if we have correctly interpreted *Baily v. Glover* the supreme court has adjudicated the question and its adjudication is a rule to us.

We add that the rule, so laid upon us, entirely accords with our preconceptions derived from the statute alone.

We now advert to several cases which have since been decided upon the federal circuit. We refer to them, not that the decisions or opinions of an inferior court can be looked into as impairing or supporting a decision of the supreme court of the United States, but because those circuit cases contain proof that our interpretation of the appellate decision in *Baily v. Glover* and others is correct. In *Wiltonberger and Norton, assignees in bankruptcy v. Phillips, 8 Wood, 115*, it appeared by the petition that the cause of action accrued on the appointment of the assignee, and that the suit was commenced more than two years after the defendant accepted, which under the civil law practice of Louisiana was equivalent to a demurrer at the common law; the circuit court sustained the exception upon *Baily v. Glover* as a controlling decision. In *4 Dillon, 386, Payson, assignee in bankruptcy v. Coffin*, the defendant plead that the cause of action did not accrue within two years before the suit was brought, the report does not show that that fact previously appeared upon the record; the plaintiff demurred; the plea was adapted to either of two theories, the theory that the bar was remedial, the theory that it was jurisdictional; and, if the lapse of time between the accruing of the claim and the commencement of the suit did previously appear in the record, the plea, instead of the demurrer, may have been resorted to, for the purpose of securing to the defense whatever of the two constructions the act might receive; the plea was sustained, and on which of these grounds the report does not indicate, but in *Walker, assignee in bankruptcy v. Turner*, same volume, at page 165, according to Judge Dillon, Judge Miller, deciding *Payson v. Coffin* orally, put his conclusion upon the *Baily and Glover* case and what he regarded as the obvious policy of the two years clause, and the almost necessary result of its peculiar phraseology. Judge Dillon attributes to Judge Miller the use on that occasion of the following expression, namely, that his decision of *Payson v. Coffin* was "thoroughly supported by the views of the supreme court

in *Baily v. Glover* ;” at first glance it might be said that that language rather referred to a dictum than to a decision, and that Judge Miller would not probably have employed it, had he been referring to an adjudication of the supreme court; and this idea could have especial force, had Judge Miller’s expression been this—“supported by the views of the judge who delivered the opinion in *Baily v. Glover*,” but, when he said; “supported by the views of the supreme court in *Baily and Glover*,” he must be taken to have studiously based his remark upon this the fixed rule for the interpretation of decisions, namely, that all that binds an appellate court, and therefore all that can be reported as its views in its opinion delivered by a single member is the conclusion and its reasons, for which two elements the court is alone responsible—all matters of dictum contained in the opinion being merely the view or views of that judge and for which he alone is responsible; therefore correctly understood, Judge Miller treated that case as an adjudication of the supreme court upon the subject, and accordingly sustained the plea in *Taylor and Coffin* on the ground that it presented a jurisdictional bar. In *Walker and Turner* the limitation was pleaded, and the defense thus adapted to the alternative theories of the clause, the plea was demurred to, and was sustained as presenting a jurisdictional bar. In *Foreman, assignee in bankruptcy v. Bigelow et als.*, 9 Cent. L. J., 430, at the first circuit, Judge Clifford, on the authority of *Baily v. Glover*, sustained a demurrer to a bill in equity upon the ground that two years had elapsed between the accruing of the cause of action and the commencement of the suit. In *Tappan, trustee in bankruptcy v. Whittemore et als.*, decided, as we understand, after the 21 of Wallace, on demurrer interposed to the complaint upon the ground that the claim was barred under section 5057 which applies equally to trustees as to assignees, Judge Wallace overruled the demurrer, because the two years had not elapsed; holding that it would have been sustained had the reverse appeared; he followed the

21 of Wall. without alluding to it, and unfairly assumes that he knew of it, when he made his decision. We therefore hold that the district court had no jurisdiction of the present suit. Is the record in a condition to enable us to act upon the defect? From the conclusion already reached, it would seem to be a necessary result that the petition does not state a right of action, unless it affirmatively shows that the suit is brought within the two years, and that not showing it, it is substantially defective; the present petition is thus defective; the third and fourth answers were each demurred to, the demurrers sustained, and judgment rendered upon them against the defendant. Whether these answers were defective or not the demurrer reached back to the petition as containing a substantial defect, and judgment on each demurrer should have been rendered against the assignee; hence the defendants' exception to the judgment as rendered on the demurrers, was well taken.

Again it affirmatively appears in the record in two instances that the district court had no jurisdiction of the suit. The petition shows that the claim accrued as early as April 11, 1872, certainly not later than August 15, 1872, the official filing of the petition that the suit was commenced on April the 8th, 1876; upon the trial the deed of appointment executed on April 11, 1872, was offered and admitted in evidence and became thus coupled with the filing of the petition; thus the defect of jurisdiction twice appears upon the record. The purpose of the offer was to show that the assignee was competent to sue, and the court to entertain the suit; the effect of the offer was the same; the admission of the deed was objected to as incompetent, and an exception taken; the objection was perfect, and must be sustained.

But the objection was superfluous. Want of jurisdiction over subject-matter is a radical, and therefore an incurable, defect. The parties cannot waive, nor can the court ignore it. A court does not create its jurisdiction; it must accept and confine itself to what is created for it; hence *ex necessi-*

tate such defect of jurisdiction carries its objection with it; appearing in the case, it is the imperative duty of the court, of its own motion, to treat the proceedings as null, and to dispose of them accordingly; for this is its only power in the given case. Mr. Gould in his Pleadings thus states the rule: "It is a fatal objection to the jurisdiction of any court, that it has not cognizance of the subject-matter of the suit, i. e., that the nature of the action is such that the court is under no circumstances competent to try it; in such case neither a plea to the jurisdiction nor any other plea would be necessary to oust the jurisdiction of the court; the cause might be dismissed on motion, or even without motion it would be the duty of the court to dismiss it *ex officio*; for the whole proceeding would be *coram non judice* and utterly void." To this we add that the rule is absolutely uniform; and is so plain and familiar, that further citation in its support would be unbecoming. The words of the act, "not maintainable," here recur, for in the light of the above elucidated principle they constitute an express direction to the court to refuse to entertain a suit, so forbidden by the statute. It follows that it was the duty of the district court, on inspection of its record, and of its own motion, to dismiss the suit. It having proceeded to exercise jurisdiction, and render judgment for the assignee, it is our duty to reverse, and we do reverse the judgment and dismiss the action and with costs to the plaintiff in error.

It is due to the learned chief justice, who tried the case below, to say that the suit was tried there on both sides without a hint against, or an apparent doubt of jurisdiction; that the construction now given to the statute is a recent idea; and that it is not remarkable that his attention was diverted from a point, that was not suggested at the bar in a case which was represented by competent counsel, and sharply contested.

Judgment reversed.

Opinion of the Court—Peck, J.

BLAIR, J., dissenting.

This case, and the following case, of "*Kent v. Upton, assignee*," were reversed in the supreme court of the United States at the October term, 1881.

KENT v. UPTON, ASSIGNEE.

ERROR to the District Court of Laramie County.

The same questions arise, the same decision was rendered by the court, and for the same reasons, as stated in the preceding case of *McLaughlin v. Upton, assignee*.

W. R. Steele, for plaintiff in error.

Johnson & Potter, for defendant in error.

PECK, J. This is an action brought by Upton, as assignee in the bankruptcy of the Great Western Insurance Co., against Kent to recover an alleged balance with interest on a contract of purchase of the stock of the company: defence was made, trial had, and verdict and judgment were rendered for the assignee, and Kent appeals. The same question of jurisdiction arises, and in the same way in this case, as in the case of Daniel McLaughlin against the same assignee, which last mentioned case has been decided at this term. The opinion in that case applies to this one.

The judgment rendered below is reversed, and the case dismissed with costs to the plaintiff in error in the district court and of the appeal.

BLAIR, J., dissenting.

Judgment reversed.

Statement of Facts.

UPTON, ASSIGNEE v. STEELE.

Where the cause of action appears upon the face of the petition to be barred by the statute of limitations, there is no cause of action alleged and the defendant may demur.

ERROR to the District Court of Laramie County.

The action was commenced in the district court on the 14th day of August, 1877. The petition alleged, that the plaintiff was the assignee in bankruptcy, duly appointed on the 11th day of April, 1872, of the Great Western Insurance Company, of Chicago, Illinois, and sought to recover a balance alleged to be due the company from the defendant upon an unpaid balance of the purchase price of certain shares of its capital stock. That on the 11th day of April, 1872, a deed of assignment was executed to the plaintiff as assignee, and that by an order of the United States district court for the northern district of Illinois, entered on the 5th day of July, 1872, the stockholders of the bankrupt corporation were required to pay the amount unpaid upon the shares of stock held by them, on or before the 15th day of August, 1872. That the bankrupt company was largely indebted, had no other assets except the amount unpaid upon its capital stock, which it was necessary to collect in order to pay its liabilities. That the defendant had not paid the amount due, but had failed and refused so to do, and prayed judgment.

To this petition the defendant filed a demurrer on the 11th day of December, 1877, alleging as grounds therefor,

First—That the plaintiff had not instituted his suit within two years of the accruing of the action to him as assignee;

Second—That the plaintiff had no legal capacity to sue;

Third—That the petition did not state sufficient facts to constitute a cause of action;

Fourth—That the action did not accrue within four years of the commencement of the suit;

Statement of Facts.

Fifth—That the action did not accrue within five years of the commencement of the suit;

Sixth—That summons in the action was not served upon the defendant within five years of the accruing of the plaintiff's action;

Seventh—That the court had no jurisdiction of the subject of the action.

The district court sustained the demurrer and rendered judgment in favor of the defendant for costs.

E. P. Johnson, for plaintiff in error.

W. R. Steele, for defendant in error.

Judgment of the district court affirmed.

UPTON, ASSIGNEE v. MASON.

ERROR to the District Court of Laramie County.

E. P. Johnson, for plaintiff in error.

E. W. Mann, for defendant in error.

Same decision as in the next preceding case, *Upton, assignee v. Steele*, and the judgment of the district court affirmed.

Statement of Facts.

O'BRIEN v. CHINIQUEY.

VERDICT—WEIGHT OF EVIDENCE. Where a case has been fairly presented to a jury upon conflicting testimony, their verdict will not be interfered with, unless the same is clearly and manifestly against the weight of evidence.

ERROR to the District Court of Laramie County.

This was an action of replevin originally brought in the First District Court by the defendant in error, to recover a certain organ, which was in the possession of plaintiff in error, as sheriff of Laramie County, who justifies in his answer by virtue of a writ of execution, issued by a justice of the peace, against C. L. Chiniquy, the husband of defendant in error. The defendant in error failing to file replevin bond, the property was returned to the plaintiff in error, and the action proceeded as one for damages only, under the statute. The case was tried by a jury, who found a verdict for defendant in error and assessed her damages at two hundred and fifty dollars. On her behalf a remittitur of one hundred dollars was subsequently filed, whereupon judgment was rendered by the Court upon the verdict, for one hundred and fifty dollars.

E. W. Mann for plaintiff in error, cited *Stanton v. Kirsch*, 6 Wis., 338; *Horneffer v. Duress*, 13 Wis., 675; *Duress et al. v. Horneffer*, 15 Wis., 214; *Gamber v. Gamber*, 18 Pa. St., 363; *Keeney v. Good*, 21 Pa. St., 349; *Auble v. Mason*, 35 Pa. St., 261; *Flick v. Dearies*, 50 Pa. St., 286; *Aurand v. Shaffer*, 43 Pa. St., 363; *Gault v. Soffin*, 44 Pa. St., 307; *Winter v. Walter*, 37 Pa. St., 155; 2 Bishop on the Law of Married Women, secs. 799–800, and following sections, 826–829.

C. N. Potter, for defendant in error, cited Compiled L. of Wyo., page 411, sec. 84; Compiled L. of Wyo., page 418,

Statement of Facts.

sec. 127; Compiled L. of Wyo., page 398, sec. 10; Compiled L. of Wyo., page 213, sec. 5; 2 Nash Pl. and Pr., 1043, 1044; *Smith et al. v. Richards*, 16 Me., 200; *Stanley v. Whipple*, 2 McLean, 35; *Hammond v. Wadhams*, 5 Mass., 353; *Reed et al. v. Gannon*, 50 N. Y., 345; *Phillips v. Wooster*, 36 N. Y., 412; *Bridgford et al. v. Riddell et al.*, 55 Ill., 261; *Pike v. Baker*, 53 Ill., 163; *Dyer v. Keefer*, 51 Ill., 525; *Dale et al., v. Lincoln*, 62 Ill., 22; 1 Bishop on Law of Married Women, sec. 710-734; 2 Bishop on Law of Married Women, sec. 365, 366; 2 Nash Pl. and Pr., 1043; *Simpson v. Pitman*, 13 Ohio, 365; *Brewer v. Inhabitants of Tyringham*, 12 Pick., 547; Testimony of Mrs. Chiniquy, Record 7-9 and 10; Testimony of Gaylord Bell, Record 19 and 20.

Judgment of the District Court affirmed.

FISHER C. J., and BLAIR J., concur.

PECK J., dissenting.

This was an action of replevin for an organ. Judgment was rendered below for the defendant in error. The petition was in common form, and alleged that the plaintiff owned and was entitled to the immediate possession of the instrument, and that the defendant wrongfully took and detained it from her. He plead the general denial; and justification by a levy, made by him, as sheriff, under an execution, issued from a justice's court against a third party, and directed and delivered to him as sheriff, to execute. Upon the trial, evidence offered under the special plea was ruled out, and properly, upon the ground that a sheriff was incompetent to levy under a justice's execution; and the trial was confined to the issue of the general denial. Upon the trial the plaintiff, as a witness for herself, testified that she purchased the organ, and paid for it out of her own money, and in installments; on her cross-examination stated

Statement of Facts.

that she paid for it \$175, then proceeded to enumerate the payments, and specified several, the enumeration amounting to less than the sum; and was then asked who made the other payments; "she objected to the question, that it was not proper cross-examination;" the objection was sustained; and the defendant excepted. The question was strictly appropriate to the cross-examination; it was confined to her testimony, which was put in to, and tended directly to sustain the affirmative of the issue; and the tendency of the question was directly to sustain the negative of the issue. The judgment should therefore be reversed. Other errors were committed by the district court upon the trial, which should be pointed out, were the case to be ordered to a new trial; but as an affirmance is to be ordered, it is unnecessary for me to do more than to justify my dissent.

JENKINS *et. al.* v. EMERY.

UNDERTAKING.—Appeal from Justice's Courts. The legislature, in requiring a given undertaking, on appeal from justice's courts, and then proceeding to provide a form for it, intends to provide through the form for all that the instrument should contain, and when it also declares that the undertaking may follow the given form, it in express terms declares the sufficiency of the form.

IDEM.—The statute requires the justice to approve the undertaking before allowing the appeal; this means that he must pass upon the sufficiency of the undertaking, both as to form and the qualifications of the surety, and his approval of the instrument is an affirmation that the surety is qualified; if this appears in the record, the affirmation appears there. The fact that the justice allowed the appeal shows affirmatively by the record, that he approved the undertaking.

ERROR to the District Court for Laramie County.

This action was commenced before John Slaughter, a justice of the peace, in and for Laramie County, on an account

Argument for Plaintiff in Error.

for services rendered by W. P. Carroll as attorney. Judgment was rendered in favor of Emery, the assignee of Carroll's claim, for one hundred dollars and costs, whereupon plaintiff in error appealed to the district court. A motion was there made to dismiss the appeal on the ground of a defective undertaking, and the fact that the undertaking was not shown by the transcript of the justice to have been approved; the motion was sustained, the appeal dismissed, and the judgment of the justice affirmed thereby.

Johnson & Potter, for plaintiffs in error.

The justice's code requires the justice to approve the undertaking, and that approval is necessarily made before the appeal can be allowed. Hence, whether the justice had formally written the word approved or not, was immaterial. If he as a matter of fact approved it, the word approved need not be endorsed. It is the fact that is important.

The fact that the appeal was allowed is conclusive that he deemed the undertaking sufficient and approved it. The presumption must be in favor of the regularity of his action, and that in his proceedings he complied with the law. Every person is presumed to conform to the law, and its violation must be shown affirmatively. Surely a justice of the peace is entitled to the same presumption. *Levi v. Darling*, 28 Ind., 497; *Prasky v. West*, 8 Smed. & M. (16 Miss.) 711.

The objection that the undertaking did not, on its face, show the surety to be a "resident of the county and property holder therein," is not tenable, because while the law requires that qualification, it expressly provides that it is not necessary such declaration should appear in the undertaking. Laws of '71, pages 35 and 36; Drake on Attachment, sec. 135.

The principal objection to the undertaking, that it did not state a maximum liability, is equally untenable. The legislature has expressly provided a form which it declares is sufficient. Laws of '71, page 36; and in fact the form

Opinion of the Court—Peck, J.

should be followed when one is prescribed. *McIntyre v. White*, 5 How., (Miss.) 298; *Amos v. Allnut*, 2 Smed. & M., 215; *Prosky v. West*, 8 Ibid, 711.

A substantial compliance with the laws is sufficient. See *Ex parte Esterbrook*, 5 Cow., 27; *Doolittle v. Dinsey*, 31 N. Y., 355; 2 Montana, 508; 4 Wis., 96, 1 Ohio, 170; 3 Ohio, 103; 5 Oregon.

W. P. Carroll, for defendant in error.

The undertaking must show that the justice approved it. It must also show that the surety was a resident of the county and a property holder therein. The provisions of the statute must be strictly complied with.

PECK, J. This case was brought in a justice's court by Emery against the Jenkinses; judgment was rendered for him, and they appealed. In the district court Emery moved to dismiss the appeal on the grounds that the undertaking was not given for a sum certain; that it did not appear that the surety was a resident and property holder within Laramie county, the county of the suit; nor that the justice had approved of the undertaking.

These objections involve the construction of section sixty-seven, taken in connection with sections sixty-eight, sixty-nine, and two hundred and three of the Justice's Code of December 16, 1876, contained in the Compilation. These sections provide that the appellant shall execute an undertaking to the appellee, with at least one surety, "to be approved by the justice," in a sum not less than fifty dollars, nor less than double the amount of the judgment and costs, conditioned that the appellant will prosecute his appeal to effect, and without unnecessary delay; and, if judgment be rendered against him on the appeal, or his appeal be dismissed, that he will satisfy the judgment and costs; that the undertaking may be as follows:

A. B. } "We, A. B. as principal, and C. D. as surety,
E. F. } undertake and promise E. F. (the opposite party)
that the appellant shall prosecute his appeal to effect and

Opinion of the Court—Peck, J.

without unnecessary delay, and that if judgment be rendered against the appellant, or his appeal be dismissed, he shall satisfy said judgment and costs."

Dated,.....

That any person may be recited as principal in the undertaking, in the absence of the party, varying the form of the undertaking to meet the case; that the surety must be a resident and property holder within the county; and, in section two hundred and three, that he shall make affidavit that he has a sufficient amount of property over all exemptions and liabilities; that, "before the justice shall allow an appeal," he shall require the appellant or his agent to make an affidavit containing certain particulars; that, the appeal being allowed, the justice shall send to the district court a certified transcript of all his docket entries, and the undertaking, affidavit and other original papers on file before him in the case, with a certificate showing that they are all the original papers so on file; and shall at the same time recall the execution, issued upon the judgment. These are the only statutory provisions on the subject. As to the objection that the undertaking was not given for a specific sum, it must be assumed that the legislature, in requiring a given undertaking, and then proceeding to provide a form for it, intends to provide through the form for all that the instrument should contain, and declares that an undertaking, found after the form, will suffice; and when it also declares that the undertaking may follow the given form, it in express terms declares the sufficiency of the form. But a comparison of the different parts of section sixty-seven, the section which defines the undertaking, shows that the form must govern, in order to accomplish the primary purpose of the section, which is to provide adequate security upon the appeal. An undertaking found according to the part of the section that precedes the form, would contain a condition, often of itself covering a sum larger than the penalty, but which would be limited in its legal effect in the penal clause. Such an un-

Opinion of the Court—Peck, J.

dertaking would frustrate the purpose of the section; the undertaking, limited to the condition, that is, omitting the penal clause and retaining the condition, would accomplish the purpose; the prescribed form provides that the undertaking last suggested, omits the penal clause, and follows the condition,—hence accomplishes that purpose.

The provision that, in the absence of the principal, any one may be recited as principal, varying the form accordingly, assumes that, with this exception, the prescribed form is to be followed, therefore it is to govern. The present undertaking follows this form.

As to the objection that it does not appear that the surety was a resident and property holder within the county, these two facts are jurisdictional, essential therefore to the perfecting of the appeal; they relate to the qualifications of the surety, and affect the sufficiency of the undertaking, and without a sufficient undertaking no appeal can be allowed; the appeal not allowed, no record or files can be certified, or sent up to district-court, the case cannot reach that court, it can acquire no jurisdiction; being jurisdictional these two facts of qualification must affirmatively appear in the record. But how shall they be made to appear? The statute makes no provision for affirming them by affidavit or certificate. It is true, it provides that the surety must justify by affidavit as to sufficiency of property, and no just reason can be assigned why it should not have required him to justify by affidavit as to his other qualifications, but it does not, and thus indicates that such justification as to his other qualifications is not a pre-requisite. The statute does however provide that the justice shall approve of the undertaking, before allowing the appeal; this means that he must pass upon the sufficiency of the undertaking, its sufficiency as to form, and the qualifications of the surety; then his approval of the instrument is an affirmation that the surety is qualified, and, if his approval appears in the record, the affirmation appears there, and the statute is satisfied. Does the record show such an approval? His transcript shows

Statement of Facts.

that, the undertaking being tendered to him, with the proper affidavit, he received them, filed the document, and allowed the appeal.

The record also shows that he certified and sent up to the district court these documents, the other originals which were on file before him, and that transcript; therefore it appears affirmatively in the record that he approved of the undertaking.

The judgment of the district court is reversed with costs.

Judgment reversed.

WARNER v. ROTH.

CONDITIONAL SALES.—In sales of personal property, when by the terms of the contract of sale the title does not pass until payment is made, and in the meantime the property is to remain the property of the vendor, who, in case of default in payment has the right to repossess himself of and to remove it without legal process, the vendor may reclaim it, even though it be in the hands of a third party, who takes it in good faith and without notice.

IDEM.—The contract does not have to be acknowledged and filed with the county recorder under sections two and three of chapter twenty of the Compilation, relating to chattel mortgages, as it does not come within the provisions of sections one and six of that act. The instruments contemplated by these sections, simply create collateral security in one party upon the property of another.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion.

Johnson & Potter, for plaintiff in error.

It seems to have been admitted, and at any rate it is a sound proposition of law, that the vendee of personal property may stipulate that the title to the property shall remain

Argument.

in the vendor until the performance of certain conditions, although the vendee takes possession of the property. And this stipulation leaves it the property of the vendor, so that he can recover it, even from third parties, who purchase from vendee in good faith and without notice. Benjamin on Sales, sec. 320 and note D; 2 Kent (12th ed.) page 498 and note 1; *Ballard v. Burgett*, 40 N. Y., 314; *Baker v. Hall*, 15 Iowa, 237; *Dunbar v. Rawles*, 28 Ind., 225, *Deshon v. Bigelow, et al.*, 8 Gray, 159; *Bailey v. Harris*, 8 Iowa, 331; *Sargent et al. v. Metcalf*, 5 Gray, 306; *Coggill et al. v. Hartford & New Haven Railway*, 3 Gray, 545, *Sargent et al. v. Gill*, 8 N. H., 325.

It follows then, that under well established principles of law, the title to the safe in question never passed from the plaintiff in error to C. F. Unfug & Bro., and that the latter never owned the property, but simply held it by virtue of an executory agreement, their part of which was never performed, and they could convey no title by a sale. It is however, claimed that the order in question should have been filed in the county clerk's office in order to bind third parties.

Chattel mortgages and all such bills of sale, deeds of trust and other conveyances of personal property as shall have the effect of a mortgage or lien upon such property, must be filed in the county clerk's office, or the rights of third parties would not be affected under the statute then in force. Compiled Laws of Wyoming, page 176, or section 6 of the chattel mortgage act.

The order for the sale of the safe is certainly not a chattel mortgage. Herman on Chattel Mortgages, sec. 15; *Dunbar v. Rawles*, 28 Ind., 225; Chicago L. News, of Dec. 2, 1876. It not being a chattel mortgage, then it is not covered or controlled by the statute in relation to chattel mortgages above referred to unless it be :

1. Either a bill of sale, deed of trust or some other conveyance of personal property.

2. And in addition thereto, it must have the effect of a

Argument.

mortgage or lien upon such property. Thus two separate or distinct things are necessary before it comes under the purview of the statute. Comp. L. of Wyo., page 176. It is admitted by the court below, that the order in question is neither a bill of sale nor a deed of trust of personal property, and there can be no doubt but that the view of the court in that regard is correct. Findings of court, Trans. page 21, lines 4 to 8 in Chicago L. News, Dec. 2, 1876. It being settled that it is neither a bill of sale nor deed of trust, then before the court can consider whether or not it has the effect of a mortgage or lien, it must be determined whether or not it is covered by the general words of the statute: "Or other conveyances of personal property." The proposition can hardly be disputed that the order is not a conveyance of personal property, or of anything else. There can be no conveyance of property unless title passes. When any particular or specified thing is not mentioned or enumerated in a statute, the courts cannot assume the power of the legislature and construe it as governed by the statute unless it is clearly and unmistakably covered thereby. Nothing can be presumed to be controlled or meant by the statute, unless the intention is so clear and positive that no other reasonable construction can be placed upon it. *Bradbury v. Wagenhorst*, 54 Pa., St. 180; *Estate of Tickner*, 13 Mich., 44. It is a well established rule of construction, that general and unlimited terms in a statute are restrained and limited by particular recitals when used in connection with them, or in other words, when general words follow an enumeration of words of a particular or specific meaning, such general words are held as applying only to persons and things of the same kind as those that are designated by the particular words; and applying this rule of construction to the section of the statute mentioned, the words "or other conveyance of personal property" must be held to refer to things like unto or of the kind of specific things mentioned just before, to wit: Bills of sale and deeds of trust. 2 Pars. on Cont., page 502, and note; *Sandiman v. Beach*, 7 B. and C.,

Argument.

96. It might be stated as a general proposition then, that the order which it is claimed should have been filed, not being one of the things covered by section 5 referred to, does not come under the provisions of the statute, and its filing was unnecessary. Chicago L. News, Dec. 2, 1876. The order cannot have the effect of a lien or mortgage. The very nature of a lien or mortgage presupposes title or property in another than the one having the lien or mortgage.

A person cannot acquire a lien upon his own property. The right which every person has to take his own **property** wherever he finds it, and from the possession of whomsoever has it, does not partake of the nature of a lien or mortgage, and has not that effect. A lien or mortgage upon property is the security of one person upon the property of another for the payment of a debt or obligation of the latter. Chicago L. News, Dec. 2, 1876; *Bailey v. Harris*, 8 Iowa, 331; *Dunbar v. Rawles*, 28 Ind., 225; Schooler's Pers. Prop., page 535; *Plummer v. Sherley*, 16 Ind., 380; Herman on Chat. Mort., page 61 and 26; Benjamin on Sales, sects. 796, 797, and notes.

In the case in controversy there was no lien or mortgage held by one upon the property of another. There was simply an agreement, that when certain conditions are performed by one, the other will transfer certain property to him. But there is another question in this case which demands consideration.

The court below rendered judgment against the plaintiff and in favor of the defendant for ten dollars damages, without any proof or evidence in the whole case that the defendant had suffered any damage whatever. And the court had no right to assume any fact to exist that was not proven or admitted, and to fix damages when none had been proven or even claimed, or attempted to have been proven.

McLaughlin & Steele, for defendant in error.

The question presented by the record depends largely

Argument.

upon the construction of the statute of Wyoming Territory in reference to chattel mortgages, &c., chapter 20, Compiled Laws, pages 175, 176. The possession of property is *prima facie* evidence of ownership; it is not, however, denied that there may be a conditional sale of chattels, by which the title shall remain in the vendor until payment or performance of conditions by the vendee. As between the plaintiff in error and Unfug & Bro., the title to the safe might have been in Warner. But it is contended that the sale made was such that the defendant in error, Roth, could acquire title to the property as against the plaintiff in error. Section one of Chapter 20, Compiled Laws of Wyoming, provides that: "No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and filed as hereinafter directed." Subsequent sections provide for the filing of such mortgages in the office of the county recorder, before they shall be of any force or effect, as against any third person, with or without notice. Section six provides: "The provisions of this act shall be deemed to extend to all such bills of sale, deeds of trust, and other conveyances of personal property, as shall have the effect of a mortgage or lien upon such property."

The sale evidenced by the contract, was a conditional sale, the effect of which was to create a lien upon the property, for except for the written agreement, Unfug & Bro. would have had good title to the property by their purchase. The possession of personal property is *prima facie* evidence of ownership, and of a right to pass title to such property. The evident purpose and effect of our statute, is to require all such agreements in reference to personal property, as create a lien thereon in favor of any person not in possession, to be placed upon file and record, to be of any effect as against the rights of third persons. Benjamin on Sales, page 298, note. The court below so construed the stat-

Opinion of the Court—Peck, J.

ute, and we submit, that such construction is not only in furtherance of justice and the protection of the innocent, but amply justified by the language and purpose of the act.

That the right reserved by the vendor in a conditional sale is a lien, see *Kelsey v. Kendall*, 48 Vermont, 24; *Hervey v. R. I. Locomotive Works*, 3 Otto, 664. The rule is not uniform that title cannot be acquired from a vendee in a conditional sale. Many courts hold that a *bona fide* purchaser will be protected. *Wait v. Green*, 36 New York, 556; *Fleeman v. McKean*, 25 Barbour, 474; *Smith v. Lynes*, 1 Selden, 41; *Martin v. Mathiol*, 14 S. & R. Pa., 214; *Murch v. Wright*, 46 Ill., 487; *Rose v. Story*, 1 Barr., 190.

The question presented in the court below, was upon the construction of the statute, and we submit that the construction there given was the proper one, requiring nothing unreasonable upon the part of a vendor who places his vendee in possession of property, and allows him to appear to the world as the owner, and a construction which will be a protection to those who deal with the ostensible owners of property in reference thereto, without knowledge of secret trusts and conditions, and that the judgment of the court below should be affirmed.

PECK, J. On the third day of March 1877, the plaintiff and C. F. Unfug & Bro. made at Cheyenne in this territory a written contract of sale by the former to the firm, of a safe upon the following terms: The safe to be shipped at Cincinnati by rail, and delivered to the firm at Cheyenne, and to be paid for by its note, due in four installments of forty dollars each, and severally on the 15th days of May, July, August and October of that year, less the freights, which the firm was to pay; the note to be forwarded to Warner at Rochester, New York, at the end of twenty days from the date of the invoice; if not so forwarded, the price to mature in thirty days from date of the bill; the title of the safe not to pass until payment had been so made, and in the meantime the safe to remain the property of Warner

Opinion of the Court—Peck, J.

who, in case of default in payment was to have the right to re-possess himself of, and to remove the safe without legal process. The contract was neither acknowledged nor filed with the county recorder. In accordance with the contract, the safe was delivered to C. F. Unfug & Co., at Cheyenne, in March of that year; they paid the freights and the first installment of \$40, and afterwards and on August 4th of the same year made an assignment for the benefit of their creditors, embracing the safe, and delivered it under the assignment to the assignees, who, as such, sold and delivered it to Roth, the latter purchasing and taking possession, without notice of the contract existing between the firm and Warner, or that anything was due to the latter upon the safe. Warner subsequently demanded the safe from Roth, who refused to deliver it; and thereupon the former brought this suit, which is in replevin, claiming a recovery of the safe as owner, and as such, entitled to the immediate possession thereof; and the latter answered, claiming the ownership and the right of immediate possession. Upon these facts the district court rendered judgment for the defendant. He claims an affirmance upon either of two grounds; one, that at the common law, though the sale was conditional as between Warner and the firm, it was absolute as between Warner and himself; the other, that the effect of the condition was to reserve to Warner against his vendees nothing more than a lien, which lien could be protected against third persons only by acknowledging the contract, and filing it with the county recorder, under and in pursuance of sections 2, 3 and 6 of chapter 20 of the Compilation relating to chattel mortgages; and, therefore, that in any view the plaintiff cannot recover. If the intention of the parties to the contract of sale, as they have expressed that intention, is to prevail, the passing of the property was conditional, the condition was not performed, and the title remains in Warner as fully as it would have remained in him had the contract not been made. According to the common law of England, such an intention would prevail,

Opinion of the Court—Peck, J.

and the sale would be conditional, completely protecting the title in the vendor against his vendee, and creditors of, and purchasers from him, and for that purpose clothing the vendor with the full right of reclamation, and, therefore, this sale completely preserved the title in Warner against C. F. Unfug & Bro., and Roth, and clothed him with that power of reclamation, whether Roth be considered as having purchased from the firm through its assignees, regarded as its agents, or as having taken title from the creditors of the firm. The common law of England, as found in English adjudications, subject only to the difference of construction established by the supreme court of the United States, subject also to the Federal constitution and statutes, and the territorial statutes, is the law of this territory. It is as entire and distinct a body of jurisprudence, and is as imperative upon the courts of this territory, as is the French law, commonly known as, and correctly called the *code civile*, an entire and distinct body of jurisprudence in Louisiana, and imperative upon the courts of that state. We can no more depart from the common law proper than we can usurp; we can no more disregard it than we can invent law; qualified as above explained, it is our rule, and we are subject unto it; we sit here simply to administer it; and this is the sum of the matter. The decisions of the state and territorial courts of this country can be consulted by us as illustrative of the common law proper, but cannot be accepted by us against that law. By no other rule can we keep within our functions; by no other rule can we guard the jurisprudence of the territory from becoming interwoven with, and falsified by the endless divergencies and contradictions respecting that law, that prevail and incessantly develop in the state and territorial courts,—divergencies and contradictions resulting in part from modification to local convenience, in part from misconception. The result is, that at the common law, Warner holds the title as against Roth. Under the rule above stated, it would not have affected the result had it appeared that the drift of American decisions was

Statement of Facts.

against the English common law as to conditional sales; but it is proper to remark that, with slight exceptions, they accord with that law.

Does the statute vary the result? If in order to protect the title in Warner against the creditors of, or purchasers from his vendees, the contract should have been acknowledged and filed under sections 2 and 3, it must have been because of sections 1 and 6. Section 1 provides that no chattel mortgage shall be valid against third persons, unless possession of the property be delivered to and remain with the mortgagee, or the mortgage be acknowledged and filed. Section 6 is: "The provisions of this act shall be deemed to extend to all such bills of sale, deeds of trust and other conveyances of personal property, as shall have the effect of a mortgage or lien upon such property. The instruments contemplated by these sections simply create collateral security in one party upon the property of another; consequently the contract of March 3, 1877, is not affected by the statute.

The judgment of the district court is reversed with costs, and with instructions to that court to proceed according to this opinion.

Judgment reversed.

FISHER, C. J., dissenting.

STEBBINS, POST & Co., v. THE UNION PACIFIC RAILROAD COMPANY.

BILLS OF EXCHANGE.—Orders for the payment of money, not payable absolutely, but out of an alleged indebtedness, and not payable to order or for a sum certain, are not bills of exchange.

ACCEPTANCE: PAYMASTER, RAILWAY COMPANY.—The office of a travelling paymaster of a railway company, is simply to pay the indebtedness specified upon the roll; the roll limits his authority, and

Statement of Facts.

he has no power to contract for his principal ; he cannot accept orders drawn upon it.

LACHES.—As between two innocent parties, that one who has been guilty of laches must suffer the wrong of a third.

PAYMENT : CONSIDERATION : MISTAKE.—Money paid by one party to another, without consideration and by mistake, becomes so much money received by him, to the use of the party paying, for which he is accountable on demand.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion.

Johnson & Potter, for plaintiffs in error.

The three orders sued on in this case were partly paid by the defendant, who had funds in its possession to pay the balance, and the orders themselves were marked or stamped paid by the defendant's stamp, and retained by the defendant. This action constituted an acceptance of the orders, and an acknowledgment by the defendant, that by taking the orders it was bound to pay the holder thereof the sum of \$187.35, the amount of funds in defendant's possession, and the only excuse or defense which defendant could have or make for refusing to pay all or any portion of that amount, would be a claim or account which it had against the holder, and this seems to have been its excuse when the orders were presented. In consideration of the facts, is it not a mere absurdity to affirm that the orders were never accepted?

Bills of exchange, payable on demand, or on a day certain, or on or after any other certain event, need not be presented for acceptance, but only for payment, even to hold the drawer or indorser. 1 Dan. Neg. Insts., 344. So payment of any bill of exchange constitutes all the acceptance necessary. A person who accepts or receives the benefit resulting from the act of an agent, or one acting as or even pretending to be agent, is estopped from disowning the agent's authority or disclaiming a ratification. Story on

Statement of Facts.

Agency, sec. 259; *Woodbury v. Larned*, 5 Minn., 339. The defendant in error, having received to its use the sum of \$95, the balance on the three orders in controversy, is in no position to deny the agent's authority, or to disaffirm a ratification of his act.

In the answer of the Union Pacific Railroad Company, the plaintiffs in error are charged with an indebtedness to the railroad company in the sum of \$95 for money paid by the railroad company upon an order given by one J. G. Childs.

The general principle that money paid under a mistake of fact may be recovered back, is limited in its application to immediate parties, and to cases where there is but a single consideration passing. It does not govern the case in controversy, because the action is between remote parties—payee and acceptor—the acceptor being the drawee. In such a case there are two separate and distinct considerations:

1. That which the acceptor received for his liability, which passes from drawer to acceptor.

2. That which the payee or holder gave for his title.

If the drawee in such cases accepts a bill he will be bound to pay it, although after acceptance he discovers he has accepted it under a mistake of fact, providing, the second consideration above named does not fail also; and that the holder obtained his title without knowledge of the facts that would render the bill impeachable as between the drawer and acceptor, and obtained it before it was overdue. And, of course, the same rule or principle prevails in an action by the drawee or acceptor against the payee or holder, to recover back money paid on the bill. The same issue is presented in either case. *Hoffman v. Bank of Milwaukee*, 12 Wall., 181; Byles on Bills, page 124; *Craig v. Sibbett & Jones*, 15 Pa. St., 240. *Patterson v. Union National Bank*, 52 Pa. St., 206, *Grant & Cory v. Ellicott*, 7 Wend., 227.

The plaintiffs in error are charged with negligence in presenting the Childs' order for payment, and on this ground

Argument for Defendant in Error.

it is claimed the money paid thereon can be recovered back. As between the acceptor and payee of a bill, the negligence of the payee in presenting an order or bill for acceptance or for payment, constitutes no cause of action. The whole doctrine of presentment of a bill for acceptance, or of a note for payment, is for the purpose of protecting drawers or indorsers. A failure to present a bill for acceptance at a certain time, may release or discharge the drawer from any liability in case the drawee refuses to accept, but such failure, although it may be the result of extreme negligence, can never be taken advantage of by the acceptor, after having accepted or paid the bill. Edwards on Bills and Prom. Notes, marg'l. pages, 387, 388 and 390; *Id.*, 155, 156; *Id.*, 430.

W. R. Steele, for defendant in error.

The plaintiffs allege an acceptance of the orders drawn by Oyster, Fuller & Chamberlain, by the defendant; this the defendant denied. It was absolutely necessary for the plaintiffs to establish an unconditional acceptance of the orders by the defendant, in order to entitle them to recover. There is no proof on the part of the plaintiffs, that Mr. S. P. Josselyn, the paymaster, had any authority to bind the defendant by an acceptance of such orders. It was not a power necessary to the performance of his duties in paying the employés, and not a part of the usual and ordinary duties of the paymaster. On the contrary, Mr. Josselyn himself testifies, that he had no authority to accept such orders; that he sometimes paid them as a matter of accommodation, and that the defendant had never, in any manner, accepted the three orders, for the alleged balance due on which the suit was instituted. The plaintiffs failed to show an acceptance by the company, defendant, and the record abundantly supports the finding of the court, that Mr. Josselyn had no authority to accept such orders, and bind the company. But even had the defendant accepted

Argument for Defendant in Error.

the orders, it had a right to recover the \$95, paid by Mr. Josselyn on the Childs' order in November, 1876.

The offset is for money by the plaintiff, had and received to the use of the defendant.

If the plaintiff had been paid money of the defendant by mistake, the defendant would have a right to recover it back. *Weeden v. Mad. R. R.*, 14 Ohio, 563—584; *West v. Mad-dock*, 16 Ohio State, 417; *Milner v. Duncan*, 6 Barnwell & Cresswell, 671; *Wheeler v. Miller*, 2 Handy, 149; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Garland v. Salem Bank*, 9 Mass., 408; *Bank of Commerce v. Union Bank*, 3 Comstock, 230; *Ellis v. Ohio Trust Co.*, 4 Ohio State, 628; *Wilkinson v. Johnson*, 3 Barnwell & Cresswell, 435; *Kelly v. Solari*, 9 Meeson & Welsby, 54; *Townsend v. Cowdy*, 8 Common Bench, (N. S.) 477; *Dais v. Lloyd*, 12 Queen's Bench, 531; *Waite v. Leggett*, 8 Cowen, 195; *Wadsworth v. Havens*, 3 Wendell, 412.

The plaintiffs were guilty of negligence in reference to the presentation of the Childs order, even had the defendant accepted it. Plaintiffs purchased the order on the 28th day of October, 1876, and did not notify defendant of the existence of the order until the 23d or 24th day of November, 1876. On the 15th day of November, 1876, eighteen days after the order was in existence, defendant having no knowledge of its having been drawn, paid Childs the amount due him. Had plaintiffs notified defendant of the existence of the order, defendant, if it had seen fit to accept the same, could have stopped Childs' pay. The neglect of plaintiffs in that respect, rendered it possible for Childs to draw his pay from defendant, after having sold it to plaintiffs. The only fault attributable to defendant or its paymaster, is in paying the Childs order; it is not denied that nothing was due Childs at the time, nor is it shown in any manner that plaintiffs have been injured by the mistake of Mr. Josselyn. There has been no lack of good faith on the part of the defendant, and the fraud in the case was on the part of Childs. It is an elementary

principle of law, that where one of two innocent persons must suffer by the wrong of a third person, that one shall suffer who has placed it in the power of the third person to do the injury. In this case defendant paid Childs in good faith, without knowledge of the order in possession of plaintiffs; the plaintiffs, by failing to notify defendant of the existence of the order, placed it in the power of Childs to obtain his pay from the defendant. The holder of a bill of exchange, payable on demand, is bound to present the same within a reasonable time. 1 Parsons, Notes and Bills, 338. What is reasonable time for presentment? 1 Parsons, 339, 341, 343, 344, 345 and notes.

The court below found that there was neglect upon the part of the holders in presentment; such finding is abundantly supported by the record.

The finding and judgment of the court below is fully sustained by the facts and law, and should be affirmed by this court.

PECK J.—Stebbins, Post & Co., sued. Their petition alleged that Oyster, Chamberlain and Fuller each drew a bill of exchange for \$70, on the defendant, in favor of the plaintiff, the bills being severally dated December 22, and 31, 1876, and January 3, 1877; that on the 20th of the same January they were accepted by the defendant, and a part of their amount then paid; that a balance of \$95 remained unpaid, for which, and interest from that date, the defendant was indebted to the plaintiffs. The general denial was pleaded. The case was tried in a district court without a jury, and judgment rendered for the defendant. The evidence does not conflict, and by its direct statements and necessary implications, clearly results in the following facts. Oyster, Chamberlain and Fuller, severally drew orders in favor of the plaintiffs, respectively dated as alleged in the petition; that by Oyster, reading, "Pay Stebbins, Post & Co., or order, \$70, due me for breaking in the month of December for Fisk, King, Winckers,

Betts, Crofford and Patterson; deduct \$6.50 for one ton of coal;" that by Chamberlain, "Pay to Stebbins, Post & Co., the amount due me for month of December;" that by Fuller, "Pay to the order of Stebbins, Post & Co., \$70, value received, and charge the same to my account." The form of address on each order being, "Paymaster U. P. R. R." On the 28th day of October, 1876, one Childs, an express messenger of the defendant, running between Omaha and Ogden, drew an order of that date as follows, addressed in the same form to the paymaster; "Pay to the order of Stebbins, Post & Co., \$95, my salary for the month of October, 1876." The four orders were received by the plaintiffs in good faith, and for value, the Childs order at its date. The paymaster's duty was to travel along the defendants' line in a paymaster's car, paying its monthly pay-roll, furnished with funds and the roll accordingly; upon his November trip for 1876, he was so furnished, and the roll specifies \$95, as due Childs for his October, 1876, salary. On the 23d or 24th of that November, upon the paymaster's arrival at Cheyenne, the plaintiffs presented the Childs order to him at his car, and he finding nothing against Childs, paid it, took it up, and cancelled it in the usual way, by the defendant's cancellation marked as paid; this presentation was the first notice to the defendant of the existence of the draft. On November 15, 1876, Childs was paid by the defendant at Ogden, through its express department, \$95, for the same salary, and left its service, and had afterwards no claim against it; notice of this last-mentioned payment reached the paymaster on December 11, 1876, and afterwards, at Cheyenne, during the month, while on his December trip, he notified the plaintiff of the error in paying the order.

On the 24th day of January, 1877, at Cheyenne, upon the trip of that month, the plaintiff sent the three orders, which are in suit by their clerk, to this paymaster at his car for payment; and they were presented accordingly. The paymaster deducted from \$210 the gross of the orders, sundry

Opinion of the Court—Peck, J.

coal bills, which the defendant held against the drawers, reducing them to \$187.35; also, the Childs order of \$95, explaining to the clerk the error of paying it, leaving a balance of \$92.35; paid this amount to the clerk, returned to him the Childs order, and received from him the other three, at the same time cancelling them, in the usual way, with the defendant's cancellation, marked as paid. Thereupon, on hearing of the settlement, the plaintiffs called upon the paymaster, notified him of their dissent, tendered a return of \$92.35, and demanded a return of the three orders, unless paid in cash in full; he declining, they retained \$92.35, under protest; they did not tender a return of the Childs order, but this we treat as an oversight. The plaintiffs proved the orders without producing, or giving notice to produce them, and without explaining their form. They were introduced by the defense, and thus became evidence in support of the general denial.

The Oyster and Chamberlain orders were not bills of exchange; the former because it was not payable absolutely, but out of an alleged indebtedness, and, therefore, upon a contingency; if it would estop the drawer from denying that it describes an absolute indebtedness, it addresses itself to the drawer, as no more than a request to pay, if due; and the latter, because it is not payable to order, or for a sum certain. The Fuller order is a bill of exchange, it being payable to order absolutely, and for a sum certain; hence the plaintiff can recover if at all, for a balance of this order. But upon the whole case the defendant is entitled to judgment.

The office of a travelling paymaster of a railway company, and the appropriate methods of exercising it, are defined in law, and the court will judicially recognize them. He is sent simply to pay the indebtedness specified upon the roll, and his duty is to pay each debt specified upon it to its owner, whether the party to whom it accrued, or to whom it has been transferred. The roll limits his authority, and he has no power to contract for his principal; therefore, he

cannot accept orders drawn upon it, though drawn by the employes, covering simply what the roll specifies as their due, and passed in good faith and for value to third parties. Yet he must pay the orders; therefore, had this paymaster accepted the orders which are in suit, his acceptance would not have bound the company; all that he could do was to pay them.

He did not accept, he only paid; kept strictly within his authority, and performed his duty. The omission of the plaintiffs to notify the defendant of the transfer to them of the Childs October salary, subjects them to its loss, protecting the defendant, which by the omission was lost in the understanding that Childs still controlled it. As between two innocent parties, that one who has been guilty of laches must suffer the wrong of a third. Thus the defendant, having discharged its indebtedness for the Childs salary by the payment of November 15th, and the Childs order having been paid on November 23d or 24th, without consideration and by mistake, the \$95 paid upon it became so much money received by the plaintiffs to the defendant's use, for which the former were accountable upon demand. Upon the presentation of the three other orders, the paymaster finding \$187.35 to be the balance due upon them, after deduction of the coal bills, and the \$95 already in their hands, properly applied that sum upon them, paid the residue, \$92.55, took up and cancelled the instruments, returning the \$95 order as a voucher belonging to the plaintiffs; in so doing his action being that of the defendant as his principal, and his own as its agent. In one particular he acted short of his duty; he should have charged the plaintiffs two months interest upon the \$95, and paid them so much less than \$92.35. Our construction of the matter is not influenced by the fact that the plaintiffs' clerk assented to the adjustment, for the assent was unnecessary to the defendant's right, and the paymaster's duty; nor is it influenced by the fact that the plaintiffs in connection with their notice of dissent, did not tender back the Childs or-

Statement of Facts.

der, for if they had, the paymaster's duty would still have been to adhere to the adjustment.

The judgment is affirmed with costs; the five per cent. applicable to dilatory appeals not to be added.

Judgment affirmed.

PRICE v. BONNIFIELD.

FORMER ADJUDICATION : JUDGMENT ON DEMURRER.—When a petition on a cause of action, appearing on its face to be barred by the statute of limitations, is demurred to for that reason, and the demurrer sustained, and another suit is subsequently brought upon the same cause of action, the petition therein alleging facts, showing that the statute of limitations has not run, the latter suit cannot be maintained, as the judgment upon the demurrer in the first suit, although error, was a former adjudication and a bar to any other suit.

ERROR to the District Court of Laramie County.

The action in the court below was instituted by Wesley B. Bonnifield, the plaintiff, to recover of George F. Price, the defendant, a sum of money alleged to be due upon a decree and judgment of the district court of the 9th judicial district of the state of California. The defendant answered: *First.*—A general denial. *Second.*—That the action was barred by the laws of California. *Third.*—A judgment recovered in the district court of the 1st judicial district of Wyoming Territory in favor of the defendant, for the same cause of action alleged in the petition. *Fourth.*—Other special matter.

Upon the trial of the cause, the plaintiff offered in evidence a transcript of a decretal order, to which the defendant objected on the ground that it was incompetent, immaterial and irrelevant, and that it was not properly au-

Argument for Plaintiff in Error.

thenticated. The plaintiff also offered evidence a certified copy of a part of the laws of the state of California, to the admission of which the defendant objected and excepted.

The defendant, to maintain his plea of a former judgment in bar of the action, offered in evidence certain records of the first judicial district court of Wyoming, and the evidence of E. R. Johnson, called as a witness as to the identity of the cause of action in the former suit, and in the pending suit.

The case was tried by the court without a jury; the court rendered judgment for the plaintiff below.

McLaughlin & Steele, for plaintiff in error.

The court below erred in admitting the transcript in evidence offered by the plaintiff. The same was irrelevant and incompetent to sustain the allegations of the plaintiff's petition; it was a decided order in an action for the foreclosure of a mortgage, and not a judgment as alleged.

A judgment is defined to be the final determination of the rights of the parties in an action or proceeding. The language of a judgment, is not that it is decreed or resolved, but that it is considered by the court that the plaintiff recover, or, that the defendant go hence without day.

The court below erred in rendering the judgment in favor of the plaintiff, Bonnifield, and against the defendant, Price. The former judgment pleaded and proven in bar, estopped the plaintiff to recover in this action. The judgment of a court of competent jurisdiction, is not only final as to the matter actually determined, but as to every other matter which properly belongs to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time, and this is so, whether the trial be had upon the merits to a jury, or judgment be upon a demurrer to the petition. *Bruen v. Hone*, 2 Barb., 586; *Southgate v. Montgomery*, 1 Paige, 41; *Bouchard v. Dias*, 3 Denio, 243; *Miller v. Covert*, 1 Wend., 487; *Baggett*

Argument for Defendant in Error.

v. *Williams*, 3 Barn. & Cress., 241; *Christmas v. Russell*, 5 Wallace, 307; *Clearwater v. Meredith*, 1 Wallace, 25; *Goodrich v. City of Chicago*, 5 Wallace, 573; *Beloit v. Morgan*, 7 Wallace, 622; *Gardner v. Buckbee*, 3 Cow., 127; *Burt v. Sternberg*, 4 Cow., 563.

Beyond question the bar is not defeated, because the special matter of the second suit is different from the first, if it be founded on the same title. *Stevens v. Hughes*, 31 Penn. St., 385; *Clark v. Sammons*, 12 Iowa, 370.

An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is pronounced, but in every other, where the right and title is the same, although the cause of action may be different. 2 Smith's Leading Cases, (7th Am. ed.,) 788, 789.

A judgment extinguishes the cause of action, and if the plaintiff brings two actions for the same cause, a judgment in one is a good bar to the other. *Nichol v. Mason*, 21 Wend. 339; *Thomas v. Rumsey*, 6 John., 26; *Miller v. Manice*, 6 Hill, 114; *Doty v. Brown*, 4 Comstock, 71; *White v. Coatsworth*, 2 Selden, 137; *Castle v. Noyse*, 4 Kernan, 329.

The statutes of limitation are statutes of repose; they stand on an equal footing with other statutory defences, and should not be discriminated against by the courts. *Spring v. Gray*, 5 Mason's C. C. Repts., 523; *Seldon v. Jackson*, 41 Barb., 55.

Johnson & Potter, for defendant in error.

The first error assigned in the motion for a new trial, is the admission of the transcript. The objection of irrelevancy is untenable; that of incompetency is disposed of by the clerk's certificate, which identifies the seal attached, as that of the court.

The second error assigned in the motion is the admission of the laws of California; but as the objection is general, stating no ground, it was properly overruled.

The third, that the findings are not sustained by sufficient

Argument for Defendant in Error.

evidence, is untenable, by reason of the failure of the record to show affirmatively that it contains all the evidence. In the absence of such affirmative statement, the presumption is, that there was sufficient testimony. 3 Gr. & Won. U. T., 1230; Powell on App. Pr., 200; *Houch v. Deity*, 3 Ind., 385; *Snowsdon v. Warder*, 3 Rawle, 101; *May v. Bayers*, 13 Ind., 412; *Boles v. Plummer*, Ibid., 448; *Fuller v. Ruby*, 10 Grey, 285; *McMullen v. The State*, 13 Mo., 30; 10 Ohio St., 168; 24 Penn. St., 72. This record contains no such statement.

The fourth, that the findings are contrary to law, is involved in the foregoing proposition.

Although the defense of former judgment could not be pressed, and is not involved in consequence of the above-mentioned defect in the record, it may be well to submit the question as to whether the judgment on demurrer, in this case, would bar another action, in which the petition stated a good cause of action. Freeman on Judgments, 212-231; *Clark v. Young*, 1 Cranch, 181; *Auroria City v. West*, 7 Wall, 82; *Gould v. E. & B. R. R. Co.*, 1 O., 526. But the question in this case is *res judicata*. *Bonnifield v. Price*, 1 Wyo. The question of limitation stands on the footing in the record; but, on its merits, the evidence brings Price within the exceptions, and this court has already so decided in *Bonnifield v. Price*.

PECK, J.—Bonnifield sued Price, and one Tyson in November, 1873, in the first district court, upon a judgment alleged in the petition to have been obtained by him in California against them in 1861. It appeared by the petition, that the suit was instituted more than five years after the rendition of the original judgment.

The territorial statute of December 10, 1869, in force at the commencement of the action, at sections 14, 19 and 28, declared that an action upon a judgment should be commenced within five years from the accruing of the cause, allowing a suspension in case of absence, absconding and

concealment. Price demurred to the petition as not setting forth a cause of action, because the cause alleged in it did not accrue within five years next before the commencement of the suit; the district court rendered judgment for the defendant upon the demurrer, Bonnifield appealed, and this court at its March term for 1874, affirmed the judgment. No appeal was taken from that decision. Afterwards, in June, 1874, Bonnifield brought a second suit against Price and Tyson in the district court on the original judgment. In addition to the statement of the judgment, alleging only that it was not barred by the statute of limitations of California or Wyoming, because the defendants had not resided in either jurisdiction since its rendition, Price plead the decision of the court, as a former adjudication, also the bar of the statute. At the trial the former adjudication was proved, and proof adduced as to the other issue, and the district court held against him as to the former, and for him as to the latter defense. Bonnifield appealed, and this court at its March term for 1875, reversed as to the defense of limitation, but affirmed as to that of a former adjudication; after which the case was non-suited below. Afterwards, in July, 1876, Bonnifield brought a third, being the present suit against Price and Tyson in the district court on the original judgment; in addition to the statement of the judgment, alleging only that it was not barred by the statute of limitations of California or Wyoming, because neither of the defendants had been within the state or territory since the rendition of the judgment, Price plead in bar the judgment which had been rendered in the first of these three suits, at the trial, which was without a jury, proved the former judgment, the district court held that it did not constitute a bar, and rendered judgment accordingly for Bonnifield. Price now appeals, presenting to us the question, whether the defense did or did not constitute a bar.

Tyson was not joined, nor did he appear in either of the three suits brought in the territory. The statute of limita-

tion in force at the commencement of the first suit in the district court, was simply remedial; the decision of this court in it, 1 Wyo., 172, arose from a confusion between remedy and right. The proposition adopted by the court is not supported by principle, nor sanctioned by sound learning; is opposed to the common law, and flatly disobedient to the rule which has uniformly existed in the supreme court of the United States since the organization of that court, and yet, this court sits as a common law court, and is imperatively bound by the federal jurisprudence. Had Bonnifield appealed from that decision of this court, there cannot be an intelligent doubt that the decision would have been reversed, and his judgment, which, so far as disclosed in his petition, was as vital when declared by this court to be extinct, as it was when rendered in California, protected. He however allowed that decision of this court to become a finality, and we are thus compelled to hold that he is now bound by it as a finality. But we also hold that it is the law of this court only as to the suit in which it was rendered; that it establishes no precedent for general practice; and that, outside of that suit, the law of this court is the reverse of that which was announced by it in that case upon the demurrer.

The allegations in the second suit as to limitation, were of no matter that entered into the cause of action, set up in the suit; relating to remedy alone, as premature, could not properly have been alleged in the pleadings, unless the bar of limitations were plead, and then, of course, only in reply to the plea. These allegations were, therefore, purely surplusage, which Price could have stricken out on motion; hence the second suit set up the identical cause of action that was set up in the first. The two suits were upon the same thing; the plea of a former adjudication, interposed in the second, was true, and upon a principle which is as well settled, as uniform and as imperative, as a principle of law can be; a principle indispensable to protection against that worst mischief in the administration of the law,—useless and vex

Syllabus.

atious litigation, (for a party may have his day in court, but only his day,) the plea should have been sustained, and the controversy ended. We hold that the decision of this court in the second suit, on the defense of a former adjudication, was erroneous, is of no authority by the suit, furnishes no precedent for general practice, does not express the law of this court. The non-suit in the second action terminated it, leaving the claim as it was at the commencement of the suit.

The third suit is, as to cause of action and the defense of a former adjudication, simply a repetition of the controversy in the second. The judgment of the district court is reversed, and judgment rendered for Price, the defendant below, upon his defense of a former adjudication, with the costs of the district court, and the costs of the appeal.

Judgment reversed.

BROPHY v. J. M. BRUNSWICK & BALKE Co.

DEFAULT : JUDGMENT.—When the district court holds a default not excused, it cannot be said that its decision was one way and the evidence all the other, and the judgment be reversed, even if the evidence would seem to justify a different conclusion.

IDEM.—Judgments on default are not to be lightly opened ; a party asking to be let in, must make a clear case.

IDEM.—A default is the non-appearance of the plaintiff or defendant at court within the time prescribed by law to prosecute or defend ; when the plaintiff makes default, a non-suit may be entered ; when the defendant makes default, an inquest may be taken, and in each case judgment to correspond will be rendered.

RECORD : COPY : AUTHENTICATION.—When a document is authenticated by a clerk of court, under the seal of the court, as a full and true copy of the record judgment in that court, it is a sufficient authentication, for use in any other court within the territory.

ERROR to the District Court of Laramie County.

Argument for Plaintiff in Error.

The facts are stated in the opinion.

M. C. Brown, for plaintiff in error.

The record of the case presents the singular fact, that the court attempted to try the case there without any pleadings, or in other words, without any issue. Section 261 of the Code tells us what an issue is, and the following section, 262, tells what a trial is.

From these sections of the law, it is evident there can be no issue without pleadings, and there can be no trial without an issue. After the issue is made up, if the pleadings in the case which form the issue are lost or withheld from the court by any person, the statutes provide a way to restore the issue or the pleadings. Sec. 126 Civil Code.

The fact that the pleadings had been filed in the court below, did not authorize the court to try an imaginary issue afterwards without pleadings. The proceedings of the court below in attempting to render judgment on the verdict of a jury in an imaginary trial of an imaginary issue, is error. 27 Cal., 522; 28 Cal., 553; 45 Miss., 461; 1 Colo., 263; 65 Ill., 481.

If the pleadings had been in court, it was error to enter the default of the defendant after answer filed, and to prove up as on default. 30 Miss., 396; 6 Tex., 229; 5 Wis., 198.

It is error for a court to permit papers to be read to a jury, when the same are not properly authenticated

J. W. Kingman, for defendant in error.

The defendant's default admitted all of the allegations of the petition, and left no issue for the jury to try. *Norris v. Dodge*, 23 Ind., 190; *Whiteley v. Douge*, 9 Iowa, 597; *Smith v. Bellett*, 15 Cal., 23; *Hunt v. San Francisco*, 11 Cal., 259.

A defendant may always be defaulted whenever he fails to perform any rule or order of the court, and it does not

Opinion of the Court—Peck, J.

depend upon the state of the pleadings. *Norris v. Dodge*, 23 Ind., 190; *Phelps v. Osgood*, 34 Ind., 150.

PECK, J.—The action was brought by the Company against Brophy, as sheriff of Albany county, for *nonfeasance* in returning no property found on an execution issued upon a judgment which had been entered up in that county, in its favor, against William C. Wilson. Brophy moved in the first district court, where the suit was pending, for a change of venue, which was denied. After issue had been joined, he not appearing on the call of the case for trial, the company took an inquest, and a verdict was returned in its favor. The case comes here upon his exceptions to the several orders of that court denying the motion for a change of venue, and a motion for a new trial. The latter motion having been denied, judgment was entered in due form upon the verdict. There is nothing to indicate that the refusal to change the venue was incorrect, and the judgment is so far sustained.

As to the motion for a new trial: One ground of it is, that Brophy was prevented from appearing at the trial, by what it designates as “accident and casualty:” this ground being evidently specified under sub-division third of section 306 of the Civil Code, which provides for motions for new trials. Whatever question may arise, as to whether the grounds, set forth in the affidavits filed by him under the motion, are embraced by this specification of the motion, or by this sub-division of the section, we pass over, in order to consider the motion in the most favorable aspect for him.

The affidavits attempt to excuse his non-appearance upon grounds, the existence of which are in part open to inquiry upon the face of the affidavits, in part are denied by the affidavit of John W. Kingman. The district court held that the default was not excused; we cannot say that its decision was one way, and the evidence all the other, and, therefore, could not reverse, even if the evidence seemed to

us to justify a different conclusion. But it is due to that court to add, that it could not have intelligently reached a different conclusion. Judgments on default are not to be lightly opened; a party asking to be let in, should make a story a clear case; a different rule would invite, not repress default. One ground presented in the Brophy affidavits is, that his counsel, a material witness for him in the case, was detained at Laramie by sickness in his family, and so prevented from attending at the trial. According to the affidavits, that counsel was a material witness for the defense, Brophy alone testifies of his detention; it is possible, but improbable that he had any personal knowledge upon the subject; that counsel had the personal knowledge, and the absence of his testimony suffices to condemn the application, so far as this ground of it goes. Besides, for aught that is suggested, the alleged cause of detention was known in season to have enabled Brophy to take his deposition. Another ground presented in Brophy's affidavits, is, that he was a material witness for himself, and was prevented by a storm from making at Laramie a connection with the east bound passenger train of January 1, 1878, by which he could have reached Cheyenne in season for the trial, which was set for, and took place on the next day. It does not appear, however, and his affidavit does not attempt to show that there was no intermediate train, by which he could have arrived in time, and the court in the absence of contrary proof, must take such judicial notice of the nature and methods of railway traffic, as to presume that there was such intermediate train, when the affiant, the party in interest, having the means of knowledge, omits to show that there was not. But, treating his uncontradicted affidavits as satisfactorily explaining his non-attendance, the counter-affidavit, uncontradicted, as satisfactorily shows that Brophy was indemnified against a judgment for the Company, was personally indifferent as to the result of the case, and as to his being present at the trial, and thus that his non-attendance was not owing to storms or misconnec

Opinion of the Court—Peck, J.

tion. But the counter-affidavit more than balances the opening affidavits on this point. As the moving party, it was Brophy's right and interest to file a replying affidavit, so far as to contradict the counter-affidavit, and support his opening affidavits he omitted to do so, and thus stands as admitting the truth of the opposing affidavit. Therefore, we unhesitatingly agree with the conclusion of the district court, in overruling the motion on this ground, and hold that the default was not excused.

Another ground is, that Brophy was defaulted, and the company allowed to take an inquest, "when there was an answer on file." These proceedings constituted an irregularity. The record shows that on the 18th day of December, 1877, in open court, by agreement of parties, the case was assigned for trial on the second day of January following; that, on that 18th day, all the papers in the case were taken from the files of the court, and carried away by the same counsel of Brophy,—who, the counsel, resided at Laramie,—and were not returned till after the trial. The taking of the inquest in the absence of the pleadings is now urged before us as a ground for reversal. The withdrawal and detention of the files, may have been the result of coincidence with the other facts, with which those two facts are connected, not of a purpose to delay the trial; we prefer to put the milder interpretation upon the matter, and therefore to assume, and we do assume, that they were neither withdrawn, nor withheld with that purpose. Nevertheless, what is the scope of this proposition of irregularity? It permits, and therefore claims that a party may withdraw the papers of a case from the court, withhold them until after the trial, and absent himself from the trial, in order to prevent a trial,—and, that scheme failing, and an adverse judgment resulting, may thus secure the foundation for a reversal; the plan would be a witty, because a most successful invention to shun a trial, and to stay the administration of justice, securing to either party, at his will, the complete control of the jurisdiction of the court

A default is the non-appearance by plaintiff or defendant at court within the time prescribed by law, to prosecute or defend. When the plaintiff makes default, a nonsuit may be entered; when the defendant makes default, an inquest may be taken, and in each case a judgment to correspond will be rendered. The default, inquest and judgment, taken in the present case, were regular, so far as this branch of the motion goes.

Another ground is, that the inquest was taken without the pleadings to show what the issues were. The proposition stands upon the principle last considered; and if entertained, would place the proceedings within the control of any party who might see fit to abstract the files, and would invite to the practice. It does not follow, that in the absence of the pleadings, the issues cannot be ascertained by the court. If it appeared in this case that the issue tried was not the issue tendered by the petition,—was a false issue,—an irregularity would appear. But the issue tried was that tendered by the petition; and, as by the default of the defendant he lost the benefit of his answer,—the case standing for all the purposes of an inquest, as if no answer had been made—that was the only issue to be tried. The motion in respect to this branch, was not well made.

The motion demands a new trial for error in the assessment, and because the verdict is not supported by sufficient evidence, and is against law. Here is a party who turns his back upon the case and abandons his defence; for all the purposes of principle, he stands as if he did it in the effort to frustrate a trial; the effort failing, and the case going against him, he reappears, claiming the same benefit of exception that he would have had, had he been faithful to the case, and raised his objections, as it proceeded. Whether he did not waive the objections, which he might have so reversed; whether a party can thus experiment with his case, and lose nothing; whether he can thus cast away, yet keep, is a question that we do not pass upon; in

Opinion of the Court—Peck, J.

order to deal with the motion upon the strongest hypothesis in favor of the defendant, we simply assume that all objections, if any there are apparent upon the record, stand secured to him the same as if he had appeared at the trial, and formally raised them. Upon this assumption we have considered the several objections for irregularity, which we have disposed of.

It is objected that the copy put in evidence as a record-copy of the original judgment, was not properly authenticated. The document is authenticated by the clerk of the second district court for the county of Albany, under the seal of the court, as a full and true copy of the record of the judgment lying in the court; this was a sufficient authentication for use in any other court within the territory.

This disposes of the objection that it did not appear where that judgment was entered. Also, of the objection that the copy of execution, introduced as the copy of the execution alleged to have been falsely returned, was not duly authenticated. Also of the objection that the judgment copy is unsigned. This objection is put upon sections 396 and 398 of the Civil Code, of which section 396 provides that the clerk shall make a complete record of every cause during the vacation next succeeding to the term of its final determination, which record the presiding judge shall at the next term subscribe; and section 398, that the clerk failing to bring up the records, the judge shall cause them to be made, and shall then subscribe them. The subscription of the judge under section 396, plainly is to be a single subscription at the foot of the records of an entire term; and his subscription under section 398, is to be a single subscription at the foot of all the records, so specially caused to be made. The sections aim to increase the verity provided for by the common law, but are inadequate to, and cannot be held to supersede the practice of the common law, according to which a party may have an authenticated copy of a particular record, for use beyond that court, as he may

desire it, and irrespective of those sections. It is objected that the judgment is void, because a confessed judgment, but unaccompanied by an affidavit of confession, filed before the entry of the judgment. If the judgment is void, the Company has suffered nothing by the alleged omission to levy, and its claims for damages were wholly fictitious. The confession was based upon promissory notes executed on the 16th day of September, 1873, and was made on the 12th day of October, 1874. It conforms to the act of December 11, 1873, which provides in its 385th section, that the cause of action shall be briefly stated in the judgment; but in its 710th section, that the act shall not apply to promissory notes theretofore executed, and that such notes shall be controlled by the laws there, at the date of the act in force.

Therefore, the act of December 10, 1869, which provides in its 431st and 432d sections that the cause of action shall be briefly stated in the judgment, and that, before the entry of the judgment, an affidavit of the defendant shall be filed, stating the facts, on which the indebtedness arose, and that its amount is justly due and owing by him to the plaintiff, applies; the present confession is unaccompanied by the affidavit, does not conform to this statute, and is defective. The district court, however, in which it was made, had jurisdiction of the subject matter, and, by his appearance, of the debtor; the confession was voluntary and oral, made at the bar, entered of record, has the verity of a record, and is good at common law; it bound the debtor under the statute; the defect in the confession is a mere irregularity, which that court could have allowed, and can allow to be supplied by making and filing the affidavit *nunc pro tunc*; and which no party could have complained of but the judgment creditor, or a third party, interested in a lien obtained under it, and then only by a direct proceeding instituted in that court. The judgment cannot be impeached collaterally. In the present case Brophy not only attempts to impeach it collaterally, but has no capacity which justifies his impeaching it directly.

Syllabus.

So much of the judgment also of the execution as relates to a mortgage lien, we treat as superfluous; we construe the one only so far as a general and personal judgment, and the other only as a process to correspond.

The proof of a false return was direct, full and clear; the charge was correct; and the verdict just.

It is objected that the verdict purports to have been rendered, not in this, but another case. There is nothing to support the objection.

The motion for a new trial was properly denied.

The judgment is affirmed with costs; but not the five per cent. applicable to a dilatory appeal.

udgment affirmed.

FILLMORE v. THE UNION PACIFIC RAILROAD COMPANY.

EVIDENCE.—A party who calls out the fact that a bond is in existence, cannot complain of the production of the instrument to confirm the fact.

IDEM.—A party cannot complain that he is held to the effect of evidence which he vouches for, by producing the witnesses who gave it.

EXCEPTIONS.—A general exception to a charge given to a jury, without specifying any supposed error, or indicating the grounds of the exception, will not be regarded by an appellate court.

VERDICT.—Where a verdict is what it should have been, though erroneously reached, it must stand.

ERROR to the District Court of Laramie County

This case was originally commenced by petition of the Union Pacific Railroad Company, defendant in error, filed in the district court of the second judicial district of Wyoming Territory, Albany county, on the 28th day of September, 1875, praying judgment against Fillmore, plaintiff in error, on account of freight, rent, etc., for the sum of \$583.59 and interest thereon from November 1st, 1872,

Statement of Facts.

at 12 per cent. per annum. And thereafter, on the 28th day of October, A. D. 1875, the defendant, Luther Fillmore, now plaintiff in error, filed in said court his answer, first denying generally the plaintiff's cause of action; second, pleading by new matter payment by application of certain moneys due defendant on a sale of ties; and third, pleading offset, setting up a sale of certain railroad cross-ties, alleging the amount due therefor on the contract price to be \$3,783.60, which said sum the defendant prayed might be set off against so much of plaintiff's claim as equals the same, and that the defendant, now plaintiff in error, have judgment for the balance thereof, with interest at 12 per cent. per annum from June 1st, A. D. 1871.

And thereafter, the said plaintiff, now defendant in error, on the 11th day of November, A. D. 1875, filed its reply to the set-off of the defendant, now plaintiff in error, same being a general denial to the said defendant's offset. Whereupon the said plaintiff applied for a change of venue, and the said papers were filed in the district court of the first judicial district on the 3d day of May, A. D. 1876, by J. W. Bruner, clerk of said court. And the said cause was thereafter tried in said court on the issues so made, and the jury failed to agree. After the said jury was discharged the defendant, now plaintiff in error, by one of his attorneys, E. P. Johnson, in open court asked permission to withdraw the first count in defendant's answer, to wit, the general denial, which was granted by the court; and the said general denial in defendant's answer was then and there struck out, and the answer then stood so amended. Thereafter, and on the 15th day of December, A. D. 1877, and upon the petition of the said plaintiff, now defendant in error, the said cause came on to be tried. And after the various proceedings had during said trial, the jury returned into court their verdict in favor of the plaintiff, now defendant in error, and against the said defendant, now plaintiff in error, for the sum of \$937.24, for which sum judgment was awarded.

Argument for Plaintiff in Error.

M. C. Brown and E. P. Johnson, for plaintiff in error.

The plaintiff in error pleaded for answer, set-off. The defendant in error joined issue by reply. The issue to be tried is the issue thus made, wherein the defendant in the action (plaintiff in error here) as to this issue has the affirmative, and stands as plaintiff, and the real plaintiff (defendant in error here) becomes as to this issue the defendant. The position of the parties is reversed. Pomeroy's Remedies, 689; *Rose v. Treadway*, 4 Nevada, 455; *Hook v. Craighead*, 32 Mo., 405.

Under a general denial the only evidence admissible is such as negatives such facts as the plaintiff is bound to prove in order to make out his cause of action. Moak's Van Santvoord's Pleadings, third edition, page 511; Pomeroy's Remedies and Remedial Rights, sec. 660, notes 664, and c. 689. The general rule, as above stated, as to the admission of evidence under a general denial, is almost universal under code practice. The great diversity of opinion and confusion arises in the application. Pomeroy's Remedies, 670 and 671.

Therefore, the only theory upon which proof of property in a third party under a general denial can be tolerated or permitted is this, to wit: That when a person sells, there is an implied warranty, and that it was incumbent upon the plaintiff in error in order to make a *prima facie* case, to prove in the first instance title in himself. No such proof is necessary, because in personalty, delivery may constitute a part of a sale. The fact of delivery shows possession, and ownership is presumed from possession. Benjamin on Sales, 313, 314, 315, 319. Failure of title, express or implied warranty, etc., can only be proved when specially pleaded. It is new matter. See Pomeroy's Remedies, secs. 708, 709, and the authorities there cited; also, 695, 700; *Fetherly v. Burke*, 54 N. Y., 646; *Weaver v. Borden*, 49 N. Y., 286, 297; *McKinney v. Bull*, 16 N. Y., 297; *Morrell v. Gowin*, 5 Discr., 389, 391; *Martin v. Pugh*, 23 Wis., 184; *Philips v. Jarvis*, 19 Wis., 204; *Stevens v. Thompson*,

Argument for Plaintiff in Error.

5 Kans., 305; *Finley v. Quirk*, 9 Minn., 194, 200, 203; *Nash v. St. Paul*, 11 Minn., 174, 118; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y., 429, 443. Fraud to be proved must be specially pleaded. Pomeroy's Remedies, secs. 687, 708; *Jenkins v. Long*, 19 Ind., 28, 29; *Caperro v. Builders' Ins. Co.*, 39 Cal., 123; *Oroville & C. R. R. Co. v. Supervisors, etc.*, 37 Cal., 354; 30 Cal., 666; *Dailey v. Proetz*, 20 Minn., 411, 417. This is so even in replevin.

Evidence of title in Bennett cannot be considered as tending even to contradict a contract of sale. This is peculiarly so when it is claimed by the defendant in error that Fillmore never had possession of property sold, and that the property when sold was in possession of third party. See authorities before cited as to pleadings, etc.; also, Benjamin on Sales, sec. 641 and authorities there cited; 2 vol. Kent's Com., page 478; *Scranton v. Clark*, 39 N. Y., 220; *Pratt v. Philbrook*, 32 Maine, 23; Parsons' Contracts, (6 ed., vol. 1), pages 573, 574, 575 and notes.

A contract of an agent once ratified by his principal becomes the contract of the principal, the same as if originally made by him. To say that a ratification of a contract can be revoked, is to say that a contract made by the principal can be revoked. A statement of the proposition is sufficient to show its absurdity.

The court charges that "fraud pollutes everything it touches"—a sentiment entirely true in morals, but only permissible in legal trials when an issue of fraud is tendered by the pleadings, giving all parties a fair chance to meet so grave a question. By permitting the defendant in error to offer in evidence in support of a proposition, as on issue joined when not pleaded, and in not permitting the plaintiff in error to meet that proposition, as on issue joined in defense, but restricting the plaintiff in error as if in rebuttal only, and this when the fault in pleading is wholly with the defendant in error, the court did great injury to plaintiff in error and deprived him of his substantial rights in the premises.

Argument for Defendant in Error.

W. R. Steele, for defendant in error.

While the plaintiff below contended that any evidence which went to show that the defendant Fillmore never had a cause of action against the plaintiff below, growing out of the sale of the railroad cross-ties in controversy, was admissible under the general issue; that any evidence is admissible under the general denial, which shows that plaintiff never had a cause of action against the defendant, and that it is only necessary to plead specially when it is sought to show that a cause of action once existed, but that it has been avoided by circumstances arising subsequently. See 1 Chitty's Pleadings, 472, 507; 2 Swan's Practice, 659, 660; 1 Nash, 171, 177, 178, 181, 184; *Wilt v. Ogden*, 13 Johnson, 56; *Sill v. Rood*, 15 Id., 230; *Heck v. Shener*, 4 Sergt. & Rawle, 249; *Young v. Black*, 7 Cranch, 565.

It is well established that where a question is fairly submitted to the jury, and the evidence in the record is ample to support it, that the court above will never set aside the verdict, as being against the weight of evidence, unless it is clearly and palpably so. 2 Nash Pleading and Practice, 1043-4; *French v. Millard*, 2 Ohio State, 44; *Abernethy v. Wayne etc. Bank*, 5 Ohio State, 266. Error must appear affirmatively, it will not be presumed. *Dallas v. Ferneau*, 25 Ohio State, 635; *Courtwright v. Staggers*, 15 Ohio State, 511-514; *Bethel v. Woodworth*, 11 Ohio State, 393; *Wagus v. Dickey*, 17 Ohio State, 439.

The Code of Civil Procedure, section 304, provides: That no exception shall be regarded unless it is material and prejudicial. See, also, 2 Nash Pleading & Practice, 1250; *Kugler v. Wiseman*, 20 Ohio, 361; *Chase v. Washburn*, 1 Ohio State, 244; *French v. Millard*, 2 Ohio S., 44; *Jordan v. James*, 5 Ohio, 89; *Harman v. Kelley*, 14 Ohio, 502; *Portage Bank v. Lane*, 8 Ohio S., 405.

An inspection of the record will conclusively demonstrate, that there is neither error of fact or law therein;

that the case was fairly and impartially tried in the court below, the jury by their verdict finding the very truth, and establishing rights that ought never to have been the subject of controversy.

PECK, J. The claim set up in the petition brought by the plaintiff below, the defendant here, was admitted upon the trial in the district court; and the only issue there tried was raised by the answer, which alleged as a counter-claim, that the Company was indebted to Fillmore in \$3,783.60, for 16,816 railroad cross-ties, sold and delivered by him to it, on or about May 1, 1872, at 22½ cents a tie, and the reply which denied the sale. The issue gave to him the opening and closing of the proofs. The Company admitted that it purchased the ties at the time, but claimed that they belonged to E. W. Bennett, and that it purchased them from him through M. C. Brown as his attorney; and introduced evidence to sustain this theory. Sundry exceptions were taken for incompetency and irrelevancy to the admission, on the part of the Company, of evidence which tended, and as tending in part to show that the purchase was so made, and that, when made, the ties were Bennett's.

It was mutually conceded that there was but one lot of ties—the 16,816, but one sale of them to the Company, and that the sale was made either by Bennett or Fillmore; which of the two sold was the principal question; if the Company bought of Bennett, it could not have bought of Fillmore; proving that it purchased of one, disproved that it purchased of the other; so that evidence tending to show that it bought of the former, went directly in support of the general denial, interposed to the counter-claim: evidence that it bought from him through Brown as his agent, explained the transaction; also went in contradiction of the testimony of Brown, who had previously sworn for Fillmore, that he, the latter, made the sale through himself as agent; evidence that, when the Company bought, the ties belonged to Bennett, gave consistency to its theory of

a purchase from him, and though a further stage of the case may show that such evidence was superfluous, it will not in this disclose a ground for reversal, for superfluity in evidence is never a ground for reversal; hence all the testimony so objected to, was competent.

Bennett, a witness for the Company, admitted on cross-examination that he had given to the Company a bond of indemnity against the payment to him of the price, so that he was the real defendant; on his re-examination he produced the bond, and it was put in evidence against an objection for irrelevancy. Fillmore had called out the fact that such bond had been given, and certainly could not complain of the production of the instrument which confirmed the fact which he had sought to establish. Exceptions were taken for incompetency and irrelevancy to the admission, on the part of the company, of evidence that it paid Bennett for the ties; the evidence was objectionable, because it had no tendency to support the general denial; like exceptions were taken to the admission, on the part of the Company, of evidence to show that Bennett, having authorized the payment to Fillmore of the price stipulated in what was claimed to be the Bennett sale to the Company, revoked the authority; and the evidence was in like manner objectionable. Exceptions for incompetency were taken to the 18th interrogatory and its answer, contained in the deposition of Clark, a witness for the Company; the question was whether the ties were purchased by the Company of Fillmore, and was answered that they were not; the question was objectionable, because it permitted the witness to state the very conclusion of fact involved in the issue; he had, however, previously testified that he purchased the ties through Brown with the understanding that the latter was Bennett's agent for the sale of them, and that they then belonged to Bennett, showing that the answer was a mere mental conclusion, based upon facts which he had already and properly testified to; a like exception was taken to the allowance of a question to Bennett, a witness for the

Opinion of the Court—Peck, J.

Company, whether he sold the ties to the Company; he answered that he did; the question was objectionable, but his other evidence shows that this answer was merely a mental conclusion, in like manner based upon facts which he had already and properly testified to; but this improper evidence would not have misled the jury, if the question, whether Fillmore made the sale, was to be submitted to it, and was therefore in that view harmless, and, if that question was not to be submitted to it, the evidence was simply superfluous, encumbering the record; and in either view its admission is not ground for a reversal. This disposes of the exceptions, taken to the admission of evidence on the behalf of the defendant in error; and the entire evidence in the case stands, as it was introduced. What was its effect, is the next inquiry.

It was conceded by Fillmore that, if he made the sale, he made it upon a title derived from Bennett shortly before he sold. His only witnesses were himself and M. C. Brown. The substance of their evidence on the subject of title is,—that Brown was the agent of Fillmore in respect to the ties, and, as such, sold them to the Company on or about May 1, 1872, at 22½ cents apiece, or at a gross of \$3,783.60; was at the same time, and before and afterwards Bennett's agent respecting the ties, and, as such, sold them to Fillmore at 18 cents apiece, or at a gross of \$3,026.88; that the sale to Fillmore was made about two days before that to the Company was made; and that the negotiations for this last mentioned sale continued from two to three days; also that Bennett was not present at either of these sales. There is no evidence that Bennett knew of either of these alleged sales or of their negotiations, till after they had been made; had he learned of them, while in progress, from Fillmore or Brown, Fillmore could have shown it upon the trial, and it was his right and for his interest to have done so; he offered no proof upon the subject, and it must be assumed that Bennett learned nothing from them of the matter, while it was proceeding; that this ignorance on Bennett's part

becomes a further element in the substance of the testimony of Fillmore and Brown,—it becomes such further element in, because it gives character to it.

It is upon this transaction that Fillmore claims to have derived the title, on which he bases his alleged sale to the Company. What does the transaction import? It imports that the alleged sales to and by Fillmore were one transaction, and that Brown, in conducting them, was acting in the double capacity of agent for and against Bennett.

This, as matter of law, vitiated the sale to Fillmore, if there was one. It further imports, by the facts of its oneness, of Brown's so acting as agent, the proximity of the sales, the large difference between the prices, and the second being for an improved price; that, when selling for Bennett, Brown knew of the opportunity of obtaining the advanced price from the Company—that he knew of it by conducting the negotiation with the Company for the price, that the sale to Fillmore, or to the company by way of Fillmore, was intended to give to the latter the benefit of the advance, and the sale to him was to take effect, or to stand, in case a sale to the Company should be effected; in short, that he was selling for Bennett against his interest, and in the interest of his vendee. This, as matter of fact, vitiated the alleged sale to Fillmore.

Thus in either of its views the transaction established the fact that the sale to Fillmore was void as to Bennett, and left his title unaffected. Is it proper to predicate the term, "established," of this evidence furnished by Fillmore's witnesses? Had the evidence been introduced through other witnesses by the Company for the purpose of impeaching his title, and contradictory evidence been introduced by him, the jury alone could have deduced the result; but there was no contradiction on the subject; his witnesses supplied the entire evidence upon it, and in part for the purpose of showing title in himself from Bennett, and so sustaining his theory that he sold the ties to the Company, and all in that connection. It was direct, strong and clear, and had

Opinion of the Court—Peck, J.

no tendency, other than to establish the fact, that the title remained in Bennett as before; this was its necessary and legitimate conclusion. As Fillmore's witnesses established this fact, he could not ask that it be left to the jury to find against their evidence that there was no such fact. A party may not complain that he is held to the effect of the evidence which he vouches for, by producing the witnesses who give it. Therefore, the result at this point of the trial was that whichever party, Bennett or Fillmore, was the vendor to the Company, the title at the time of the sale was in Bennett.

Let us next ascertain how the question, as to who was that vendor, stood at the close of the testimony. It was mutually admitted that Brown acted as agent for the vendor, and Clark as agent for the vendee. It was not denied, and was virtually admitted by Fillmore that the following documents, relating to the ties, were exchanged in the course of the only sale, and the very sale, that was made to the Company, and were genuine and correct. These were the documents:

LETTER FROM FILLMORE TO CLARK.

LARAMIE, April 17, 1872.

S. H. H. CLARK, ESQ., A. G. Supt.:—

DEAR SIR—Mr. Brown of this place, attorney for Bennett, offers to sell the Bennett ties, lying at Port Steele, for 35 cents apiece, and give the Railroad Company ample security to defend any claim made by Davis and associates on the same, which I am positive he can do, for the reason that Davis and associates never had any legal claim upon them, they having been made by Bennett without having any contract whatever with Davis and associates. As regards the Bennett ties, they are much better than the ties at Laramie and Wyoming will average. There is about 16,000 of the Bennett ties, to which I refer.

Yours truly,

L. FILLMORE.

Opinion of the Court—Peck, J.

TELEGRAM FROM BROWN TO CLARK.

LARAMIE, April 30, 1872.

S. H. H. C.

Will sell at 22½, if you will move ties at once. All can be saved, if you will use energy and promptness. Answer.

M. C. BROWN.

LETTER FROM BROWN TO BENNETT.

LARAMIE, May 20, 1872.

E. W. BENNETT, Esq., Port Steele.

DEAR SIR—Your letter received. You do not say whether voucher shall issue to Fillmore or not. Clark thought it should be so issued, but desired you to say that you are satisfied with that arrangement. Of course Company wont pay for 30 or 40 days, but will issue voucher at once for them. Are altogether 16,800 ties. Mr. Fillmore proposes to pay you for that number, if Clark will issue voucher for that number.

M. C. BROWN.

LETTER FROM BENNETT TO BROWN.

FORT STEELE, WYO. TER., May 22, 1872.

M. C. BROWN, Laramie City.

Yours of the 20th inst. is at hand. The voucher can issue to Fillmore, of course. That is the understanding I had with Clark at Rawlins. I do not know anything about Fillmore, but suppose it is all O. K. If you say that it is all right, I am perfectly satisfied: but, as I wrote you, I want the money as soon as possible. Please write me, when I can expect to get it. I shall look to you to settle with me.

Yours truly,

E. W. BENNETT.

Opinion of the Court—Peck, J.

LETTER FROM CLARK TO BROWN.

OMAHA, (Neb.) May 27, 1872.

M. C. BROWN, Esq., Attorney, etc.

DEAR SIR—Yours of the 23d inst. duly received. The voucher for Bennett ties has been audited, and will be paid, when called for. Same was made in favor of L. Fillmore, Esq., as per yours and Bennett's instructions.

Yours truly,

S. H. H. CLARK.

Of these documents some precede and lead to and the rest succeed and rest upon the contract of sale. By the first Fillmore calls the Co's. attention to the ties as Bennett's ties for sale by Brown as Bennett's attorney, and all the documents upon their face framed upon the idea, and admit of no other idea, than that, and so virtually declare that the sale was by Bennett, through Brown as his agent, to the Co.; though they do not indicate that it was written, they point altogether to that as the central fact. Had these documents appeared in proof in the first instance, accompanied by these admissions, it would have been incompetent for Fillmore to have introduced parol evidence to show that he, not Bennett, was the vendor; he would have been estopped by the rule that written cannot be contradicted by parol testimony. But, further, on the 15th day of May, 1872, the contract was reduced to writing, executed and delivered to the Co., by Brown as agent for Bennett, and, in so doing, Brown was acting in concurrence with, and at the instance of Fillmore, for such is the clear import of his evidence as Fillmore's witness. The instrument is as follows:

CONTRACT OF SALE BY BENNETT TO THE CO.

Sold to S. H. H. Clark, Assist. Supt. U. P. R. R. for

the Co., what is known as the Bennett ties at Fort Fred Steele—16,832 ties—as reported by Mr. Shankland, Division Superintendent, at 22½, \$3,787.20. Please issue voucher to Mr. L. Fillmore for above amount.

E. W. BENNETT.

By M. C. BROWN, his Attorney.

LARAMIE CITY, W. T., May 15, 1872.

According to the above stated principle, and by the no less rigid principle, that a written contract cannot be varied by parol, Fillmore would have been estopped from introducing the evidence. The real evidence was introduced before these documents appeared in the case; the force of the principle is the same; they controlled, and, virtually struck out that evidence. Here it is to be observed that these instruments were introduced by the Company, and in the rebuttal no evidence was made to impeach them. Thus at the close of the evidence it had become an established fact in the case that the sale to the Company was made by Bennett, and therefore not by Fillmore. As the fact was no longer open to dispute by him, it had ceased to be a question, and was not open to the jury; the jury is neither needed, nor can be allowed or asked to enquire as to the existence of an ascertained fact.

Testimony was introduced by Fillmore to show that Bennett ratified the alleged sale to him. Assuming that Bennett ratified, that did not tend to show that he did not, and that Fillmore did, sell to the Company; nor did it change the status of the Company, as Bennett's vendee, making it Fillmore's vendee; its only effect was to transfer to Fillmore a right to the price due by the sale from the Company to Bennett; and therefore to establish in Fillmore against the Company, a claim essentially different from that which is alleged in his defense. The testimony intended to show the ratification, was therefore incompetent for the purpose. Here it will be instructive to observe

Opinion of the Court—Peck, J.

some extrinsic evidence, connected with and pertinent to the documents, though not necessary to this interpretation, nor material to their effect.

Clark testifies that he negotiated with Brown as the agent of Bennett, and understanding that he was such agent, and had no knowledge of any connection of Fillmore with the ties in respect to the purchase by the Company from Bennett, except what is contained in Fillmore's letter of April 17, 1872, nor had any connection with him in the matter, except by that letter and his reply to it of April 22, 1872. The letter of April 17 contains no indication that Fillmore had, or was to have any interest in the ties, or in the disposition of them, and no inference can be drawn that Clark's answer contained any: the documentary evidence verifies this statement. In his evidence, given in the opening, as a witness for Fillmore, Brown testifies that he was Bennett's agent for the sale of the ties, as such sold them to Fillmore, and forthwith resold them, as Fillmore's agent, to the Company:—evidence, which in the absence of the documents, does not indicate whether in the resale he did or did not disclose to the Company the alleged agency for Fillmore, and is equally consistent with either supposition; in the light, however, of the documents it would be false if intended to mean that this agency was, and true if intended to mean that it was not disclosed; upon the duty of the court to reconcile the different parts of the testimony—even a given part in the abstract, equally bears diverse interpretation—this part of Brown's evidence must be taken to mean, that upon the supposed resale he did not disclose his agency for Fillmore.

In the rebuttal Brown again testifies, but does not question the above quoted evidence of Clark, which had in the meantime been given; this silence is acquiescence, and verifies Clark's statement, that, during the negotiations of the sale, he had no knowledge of Fillmore as a party to it. If I have correctly interpreted the evidence adduced by Fillmore as to the agency of Brown in transferring to and

from him, and Brown did so sell to and for him, these two sales were correct transactions as to Bennett and the Company, intended to secure to Fillmore the excess on the actual and ostensible sale, which was made to the Company, of all above eighteen cents a tie; the purpose is obvious.

We come now to the requests to charge, and the charge. It was the right of the plaintiff below, that the jury should be instructed to return a verdict for the amount claimed in the petition. Therefore every rejected request made by the defendant below, proposed a false issue to the jury, and was properly rejected. The requests on the part of the plaintiff below, the allowance of which was excepted to, also proposed false issues to the jury, and were therefore erroneous, but because they asked for less than that party was entitled to, the other side cannot complain; the charge was erroneous because it did not direct a verdict for the Company, as above explained, but submitted to the jury for ascertainment, a matter already ascertained. Fillmore may not complain of the charge for two reasons—one, that the case was put to the jury less favorably for the Company, and more favorably for himself than it should have been, and he has suffered nothing by it; the other, that the exception to the charge is to it as a whole, not specifying any particular part or parts as objected to, or the ground or grounds of objection. As the verdict is what it should have been, though erroneously reached, it must stand, and the judgment below affirmed, with costs.

Judgment affirmed.

Statement of Facts.

THE UNION PACIFIC RAILROAD COMPANY v. BYRNE.

NEW TRIAL.—A mere statement of abstract propositions unaccompanied by evidence for testing them is not a motion for a new trial ; it is a mere inchoate proceeding which should be stricken from the files.

IDEM.—It is no ground of objection that a motion for a new trial was not heard by the judge who tried the case, where the judge hearing the motion does so at the request of the moving party.

REMITTITUR.—Where a remittitur is filed, it is only an admission that the verdict was excessive in the amount remitted.

JUDGMENT.—Where the basis of a judgment has been laid, the point for entering judgment has been reached, the order for its entry is a form, and any judge qualified to act in the case may make the order.

ERROR to the District Court of Uinta County.

The action in the court below was instituted by the defendant in error, to recover of the plaintiff in error an amount alleged to be due for timber, lumber, etc., delivered by the defendant in error to the plaintiff in error.

The defendant below demurred to the petition, which was overruled and an exception taken. The defendant then answered: *First*, a general denial. *Second*, failure of title of the plaintiff below to the property alleged to have been sold to the defendant.

The case came on for trial in the court below on the 12th day of July, 1875, the jury finding a verdict in favor of the plaintiff below.

Within the three days the defendant below filed its motion for a new trial. The motion for a new trial was continued, and not disposed of until the 27th day of January, 1877, when the same was denied and judgment rendered for the plaintiff below. The case was tried at the July term, 1875, before the Hon. J. M. Carey, then presiding judge of that district, and the motion for a new trial came on to be heard before the Hon. E. A. Thomas, presiding judge at the January term, 1877, Judge Carey's term of office having expired.

W. R. Steele, for plaintiff in error.

H. Garbanati, for defendant in error.

PECK, J. This is an action of assumpsit for merchandise sold and delivered by Byrne to the Company. The latter duly excepted, and duly presents to us under section 302 of the Civil Code, an exception to an order of the district court, overruling its demurrer to the petition; but the exception has no merit.

The defendant below answered over, an issue of fact was raised upon the answer, and at the July term for 1875 a jury trial was had, and a verdict rendered for the plaintiff below for \$755.82, Judge Joseph M. Carey presiding; and the case was continued for judgment from term to term until the January term of 1877. The record contains no evidence, requests to charge, or charge, and other than the exception relating to the demurrer, and an exception to an order overruling a motion for a new trial and allowing an entry of judgment, no exception.

At the July term for 1875, the Company reasonably moved for a new trial on the several grounds: That the verdict was against evidence, was against law, was excessive, and that the court erred in refusing two several requests specified in the motion to charge; which motion was continued for hearing until the January term for 1877, Judge Carey having in the meantime left the bench. On the 10th day of September, 1875, Byrne filed a remittitur of \$355 upon the verdict, and a motion for judgment upon the balance. At that January term the Company brought on its motion for hearing before Judge E. A. Thomas, who had succeeded Judge Carey, and was regularly holding the term, who at the same term overruled the motion, and rendered judgment upon the verdict according to the motion for judgment, filed on September 10th, 1875; and the Company excepted to the order overruling the motion for a new trial, and granting judgment. The company now claims that the motion could have been heard only by the judge

who tried the case; and as he had left office, that it could not afterwards be heard at all; and, as the mover was thus deprived of the benefit of his motion, that it was the duty of Judge Thomas to have ordered a new trial, not upon the motion, but because the mover had lost its benefit by an uncontrollable cause, imputing to him no laches, and a new trial was necessary to the protection of its right by putting it where it might have been put, had its motion been competently heard. Assuming that the motion could have been competently heard only by the judge who tried the case,—and this point it is unnecessary for us to, and we do not pass upon—there are two answers to the claim that Judge Thomas should have ordered a new trial. Our answer is, the Company asked him to hear its motion; if till then he had no jurisdiction over the motion, the want was waivable and the Company waived it, and its exception to his order is only an exception to his action on the merits, after he had thus properly acquired jurisdiction; that if the Company desired to avail itself of a supposed right to a new trial, because there was in office no judge competent to hear the motion, it should have made a separate motion accordingly, and have appeared here with an appropriate exception to an order refusing it. It made no such motion, no such exception is before us, and this party is not in an attitude to complain on the ground now taken by it, that a new trial was not awarded.

Another reason is, that the motion thus far treated as a regular motion for a new trial, was not one; it was a mere statement of abstract propositions accompanied by no evidence for testing them, and therefore useless; it was a mere inchoate proceeding which the judge who tried the case could not have heard. All that any judge could properly have done with it was to have ordered it to be stricken from the files, as being nothing. Judge Thomas should have ordered it from the files; but, as he brought it to nothing, though by an irregular way, the Company has suffered nothing; and thus far the proceeding upon the motion presents no grounds for reversal.

The Company further claims that, in hearing the motion upon its merits, Judge Thomas should have treated the remittitur as an admission by Byrne that the verdict was excessive to an extent beyond the amount remitted. As without the remittitur there would be nothing in the record to indicate that the verdict was excessive as rendered, with the remittitur we can only see that it was excessive in the amount remitted; we therefore allow nothing to the plaintiff in error on this point.

It further claims that the judgment could have been entered up only on the order of the judge who tried the case. Where the basis of a judgment has been laid, the point for entering judgment has been reached, the order for its entry is a form, and any judge qualified to act in the case, may make the order. Nothing can be plainer in principle, nor more familiar in practice.

The record contains what it denominates a bill of exceptions. That proceeding is simply a recital of a motion for a new trial, the hearing and denial of it, and the exception to the order of denial and for judgment, as those particulars have been above detailed in this opinion; and purports to have been allowed by Judge Thomas.

As to this alleged bill, the record presents nothing more than it previously presents as to the motion and the proceedings upon it; is not a bill of exceptions either at common law or under the statute; is inchoate and meaningless; could have been moved from the files at the will of the plaintiff below, and in no wise affects the case, except to encumber the record.

The judgment is affirmed with costs, but without the addition of the five per cent. allowed upon dilatory appeals.

Judgment affirmed.

Argument for Plaintiff in Error.

FEIN v. TONN.

EVIDENCE.—Evidence introduced in support of a counter-claim is inadmissible where it tends to establish a cause of action different from that set up in the answer; and without consent the cross suit cannot be amended so as to admit the evidence.

JURISDICTION OF APPELLATE COURTS : WEIGHT OF EVIDENCE.—Where an appellate court is empowered to revise upon the facts, it can never reverse them, simply because upon the evidence, as submitted to it, it would have arrived at a different conclusion, and can only reverse where the verdict,—or if the trial was by the court, without a jury, the findings below,—were so clearly against the weight of evidence that no mind of fair intelligence, faithfully exercised, can be reasonably supposed to have arrived at the result complained of.

ERROR to the District Court of Albany County.

On the 30th day of December, 1875, the defendant in error filed his petition against the plaintiff in error, in the district court of Albany county, Wyoming Territory, to recover the sum of \$590.88 for goods, wares and merchandise before that time sold and delivered. Thereafter the plaintiff in error filed in said court his answer to said petition, on the 3d day of February, A. D. 1876, first denying any indebtedness, and pleading offset in the sum of seventeen hundred and seventeen and thirty-seven one-hundredths dollars (\$1,717.37.)

The general denial was replied to the counter-claim, and upon the issue thus made the cause came on for trial before a jury; and, after the evidence was presented, they returned their verdict into court, finding in favor of the defendant in error in the precise sum named in his petition, viz., \$590.83.

Brown & Brockway, for plaintiff in error.

When the verdict of a jury is clearly against the weight of evidence, it should be set aside and a new trial granted by the court; and particularly is this true when the verdict is so manifestly against the weight of evidence as to indi-

Opinion of the Court—Peck, J.

cate the existence in the minds of the jury of prejudice or passion. See 7 Mass., 261; 13 Mass., 507; 4 Conn., 102; 12 Conn., 487; 3 J. J. March, 440; 3 Blackf., 304; 1 Bibb, 334; 5 Ohio, 245 and 509; 12 Ohio, 151.

C. W. Bramel and I. P. Caldwell, for defendant in error.

The court will not set aside a verdict and grant a new trial upon the sole ground that the verdict was not sustained by sufficient evidence, unless it is manifest that the jury acted in a total disregard of the evidence. They did not so act in this case.

PECK, J.—This is an action of assumpsit brought by Tonn against Fein, for merchandise sold and delivered on account; a bill of particulars being filed with, and by reference made a part of, the petition; the defendant below plead the general denial, and a counter-claim for merchandise sold and delivered, and moneys advanced; the general denial was replied to the counter-claim.

Tonn testified for himself, and was asked if he had ever presented the account to the defendant, and, if so, what the latter said, if anything, respecting it; to which objection was made on the grounds of irrelevancy and incompetency, and as assuming that the suit was on an account, though it was not so alleged in the petition; the objection was overruled, and an exception taken; the question was properly allowed.

The witness answered that he did present the account, and the defendant admitted that it was correct, except that it did not show sufficient credits; that he showed the defendant his, the witness' books, when he had settled with the defendant in 1871. Here the defendant moved that the answer be stricken out, and the motion being denied, excepted; the motion was properly denied, because the objection specified no ground, and the answer was strictly responsive.

Opinion of the Court—Peck, J.

The witness was asked if the defendant had given to him an order in payment of the account; having answered that he gave to him an order on the clerk of the court for whatever was coming to him, the defendant, on a certain judgment, the witness was then asked what, if anything, the defendant said on the occasion of giving the order, about paying the balance of the demand; the objection to the first question above stated was renewed to each of these subsequent questions, was overruled and an exception taken. These two subsequent questions were properly allowed.

The order was produced, identified, and offered in evidence; it was an order dated June 30, 1874, made by Fein on the clerk, requesting him to "*sign the balance which is left on judgment over to M. G. Tonn.*" The defendant objected to its admission on the ground that it was irrelevant and incompetent, specified no amount, and had no tendency to show an admission of Tonn's claim; the objection was overruled and an exception taken; the instrument was properly admitted.

Evidence was introduced on both sides, under the issue raised upon the petition, and conflicted. The only evidence introduced to support the counter-claim, was testimony tending to show that Tonn was indebted to Fein for moneys collected and goods sold by the former for the latter, and for a balance in a partnership account in a mining transaction; and this conflicted with counter-evidence introduced by Tonn. The evidence so introduced in support of the counter-claim was not objected to. The district court instructed the jury at the request of the defendant below, that the plaintiff below could not recover, unless his petition was sustained by a preponderance of testimony; that should he fail so to sustain his petition, and they should find from the evidence that at the commencement of the suit he was indebted to the defendant in a sum certain, "as alleged in the counter-claim," they should find for the latter; and further instructed the jury that they were the sole judges of the weight of the evidence, and so far as it was conflicting,

Opinion of the Court—Peck, J.

that they were to endeavor to reconcile it, and do justice between the parties. The jury rendered a verdict for the plaintiff below for the full amount of his claim; the defendant moved for a new trial upon the grounds that the verdict was not sustained by evidence, was excessive, was rendered under prejudice, and was against law; the motion was overruled and an exception duly preserved.

Does the motion affect the verdict, as a verdict against the counter-claim? The evidence introduced in support of the counter-claim tended to establish a cause of action different from that set up in the answer; and would have been inadmissible, had the plaintiff objected to it, nor without consent could the cross suit have been amended, so as to admit of the evidence; whether this incompetency was caused by the omission to object is unnecessary for us to, and we do not decide; it is sufficient that under the charge given at the defendant's request, the jury was confined to the issue, which had been raised upon the counter-claim, and would therefore find nothing due him, "as alleged in it;" they found nothing for him under it, and thus obeyed the instructions; had they found for him under it, that disregard of the charge would have been a conclusive reason for vacating the verdict. As the defendant's request to charge restored the cross-suit to its proper issue, assuming that it had been displaced from that issue by the plaintiff's omission to object, and so brought it to its right conclusion, the verdict is not now open to criticism as respects the counter-claim. It must be presumed that a jury follows the charge until the contrary appears: the presumption holds in this case, because the verdict in this part of it matches, and thus verifies the presumption; we conclude therefore that the jury arrived at this result, by disregarding the evidence introduced under the issue made upon the counter-claim, because none of it was pertinent to that issue, and not by weighing the conflict that existed in that evidence. It is morally clear, we admit, that, in making the request, the defendant contemplated no such construc-

tion of it, but on the contrary sought to secure under the counter-claim the verdict which his evidence tended to establish: but such a consideration cannot affect our construction of the record; we must treat it according to its legal effect. For all the purposes of the motion, therefore, the case stands as if no counter claim had been set up, nor evidence introduced to show one. But further, if the charge as to the counter-claim is open to any criticism, it is to criticism on the part of the plaintiff: for the requests to charge confined the defendant's claim to a verdict in the cross-suit to the demand set up in the answer; the court should in terms have directed the jury wholly to disregard the claim, on the ground that there was no evidence in the case relating to it, and not, as it did, to have left it to them to determine a question of law, by determining whether there was or was not such evidence in the case.

It is proper to remark in concluding this part of the case, that, had it been right for the jury to dispose of it by weighing the evidence which was introduced respecting it, and we could see that they did so dispose of it, we should find in their conclusion no ground for disturbing the verdict as rendered against the weight of the evidence in the sum stated below. Does the motion affect the verdict as a verdict sustaining the petition? Nothing indicates that it was rendered under prejudice. The testimony introduced under the issue raised upon the petition, was contradictory; and the jury were properly instructed as to their duty respecting it.

In the case of the *Hilliard Flume & Lumber Co. v. Wood*, 1 Wyo., 411, we said—"where an appellate court is empowered to revise upon the facts, it can never reverse on them, simply because upon the evidence, as submitted to it, it would have arrived at a different conclusion; and can only reverse when the verdict, or, if the trial was by the court without a jury, the findings were so clearly against the weight of evidence, that no mind of fair intelligence and faithfully exercised can be reasonably supposed to have

arrived at the result which is complained of; or, to state the rule in a different form, but as conveying the same idea, tends to an opposite conclusion; which is to say, reducing the rule to a brevity, where the evidence is all one way and the verdict or findings another. In that case the court added—"this rule is not founded merely in the respect which is due from an appellate to an inferior court, but in the very necessities of justice; a less stringent rule would would inevitably invite every appellant to a new trial upon the facts in the appellate court." We adhere to that exposition. Applying this rule we cannot see that the verdict upon this branch of the case is not sustained by the evidence, is excessive or against the law.

The judgment is affirmed, with costs of the appeal, but without the five per cent. allowed upon dilatory appeals.

Judgment affirmed.

BLAIR J., dissenting.

FEIN v. DAVIS.

JUDGMENT: MECHANICS' LIEN.—The action was for a balance due upon account for work and labor done and materials furnished, and for the enforcement of a mechanics' lien against certain buildings. The petition failed to show that the defendant was the owner of the land upon which such buildings were situated. The jury returned a verdict for the plaintiff for \$171.68 damages and costs, and thereupon the court rendered judgment for the amount of the verdict and costs, and in continuation adjudged that, in case of non-payment of the damages and costs within thirty days, the premises, described in the petition, should be sold to satisfy the judgment: *Held*, that the judgment as to the damages and costs being a general and personal judgment is affirmed to that extent, but as the petition failed to allege that the defendant was the owner of the land upon which the buildings were situated, the judgment so far as it is a lien judgment is reversed.

ERROR to the District Court of Albany County.

Opinion of the Court—Peck, J.

The action was commenced by Davis in the district court of Albany county, at its May term, 1876, against Fein on account for work and labor done and materials furnished, for the sum of \$165.50 with interest thereon from September 7th, 1875, at the rate of 12 per cent. per annum; and for the enforcement of a mechanics' lien against certain buildings described in the petition as follows: "A certain dwelling house of said defendant described as being a story and a half log dwelling house, situate on the southeast quarter of the southeast quarter of section No. 4, township No. 15, range No. 73 west, and claimed by the said defendant, J. J. Fein, in the county of Albany and Territory of Wyoming."

The defendant filed a motion to quash the summons on the ground that it was improperly served, which motion was overruled by the court.

The defendant then answered: *First*, a general denial. *Second*, payment. Case came on for trial in the court below on the 16th day of May, 1876. The jury returned a verdict for the plaintiff for \$171.68.

Brown & Brockway, for plaintiff in error.

C. W. Bramel and I. P. Caldwell, for defendant in error.

PECK, J. We sustain without comment the order of the district court, denying the motion to quash the summons. The action was brought by Davis in assumpsit for work and labor done, and materials furnished by him in building a house for Fein: to which the latter plead the general denial and payment. Upon the trial Davis introduced evidence tending to make out a case, and rested: Fein was called as a witness for the defense, and asked whether the house was or was not built for a sum certain on a certain verbal contract made between himself and Davis before the work upon it was commenced. The question was objected to as irrelevant and incompetent, was excluded, and an exception

taken. The question was leading, because it embodied a material fact, and alternative enquiries, each of which admitted of an answer by a simple affirmative or negative; it was relevant, but incompetent. Moreover, the witness had already stated precisely what the question called for, except that his statement did not in terms show whether the contract was verbal; with that exception it was a complete answer, and the question was purely repetition; this rendered the question incompetent, because it purposed to burden the case with useless matter: it could have availed the defendant, only as seeking to prove directly, what that statement fully implied, namely, that the contract was verbal; but, to accomplish that, the enquiry should simply have asked for the form of the contract, or (with the consent of the court or adversary) as a leading one—whether it was verbal or written. But the additional evidence would only have been cumulative; and, as long as the implication was undisturbed by adversary evidence, it was discretionary with the court to allow or disallow such testimony in advance, whether objected to or not. There was therefore good ground for rejecting the question, and it is immaterial upon what mental operation it was done.

The defendant below requested the court to instruct the jury imperatively to find specially upon certain points, the court declined so to charge, but stated the proposed findings to them, instructing them that they might return a verdict, finding or not finding upon the points according to their discretion; and to this instructing, so leaving it to the discretion of the jury, he excepted.

The instruction excepted to complied with the statute, and is sustained.

The jury returned a verdict for the plaintiff below; the defendant moved for a new trial on the grounds that it was rendered without sufficient evidence, under prejudice, and against law. The motion was overruled, and an exception taken. To be unsustainable by evidence, the verdict must have been against the weight of evidence in the sense of

Opinion of the Court—Peck, J.

the rule, which we stated and explained in the case of the *Hilliard Flume and Lumber Co. v. Woods*, 1 Wyo., 396; there was much conflict in the evidence, and we cannot say that the verdict violates that rule. The petition declares only for labor and materials; under it a bill of particulars was filed, amounting to \$215.50, of which \$214.50 were for labor and materials, and \$1.00 for cash paid for expressage; \$50 are credited upon the bill, leaving a balance of \$165.50. A bill of particulars can limit, not enlarge the claim, alleged in the pleading, under which it is filed; had the verdict been for the full amount of this balance, it would have been unsustained, and so excessive as to the \$1.00; but as it was less than the balance by more than that sum, the jury were instructed in effect that the plaintiff could recover only for labor and materials, and the legal inference is, that, obeying the charge, they found only for labor and materials. There is nothing to indicate that the verdict was returned under prejudice. The suit was, also, for the enforcement of a mechanic's lien against the house for the labor and materials in question. While testifying in chief, in the course of his opening, Davis read to the jury, in evidence, what is called in the case a notice of lien, consisting of a description of the property, on which the lien was claimed, and the above-mentioned statement of amount, both which had been filed with the petition, and made parts of it by reference. The defendant objected to the reading of them, on the ground of irrelevancy and incompetency, and that they did not tend to prove any issue that was before the jury; and excepted to the decision allowing them to be read. The objection, as an objection to the documents being used in evidence before the jury, was sound in part. Whether the court should, or should not, have entertained the branch of the suit relating to the alleged lien, the account was the basis of the main issue, and the reading of the bill of particulars was proper for the better understanding by the jury of the evidence which was adduced in explanation and support of the account, and as to this the objection was not

Opinion of the Court—Peck, J.

well taken; but the issue as to the account alone was before the jury, the description of the property sought to be charged with a lien, had no tendency to establish this issue, was irrelevant to it, and therefore, incompetent as evidence upon it, and to the reading of this document the objection was well taken; but from the nature of its irrelevancy, the reading of the document could not have affected the mind of the jury; if the court should have entertained this branch of the case, the description, accompanied by proof of verity, must necessarily have been read in evidence by Davis in the jury's hearing, because it was evidence to be addressed to the court in support of the alleged lien (provided, its competency was not lost by its withdrawal from the register's office—a circumstance which is mentioned below, and which does not affect the present question) though methodically it should have been so read, after all the evidence going to the jury had been introduced, inasmuch as the principal claim had to be established, before the collateral claim was reached; moreover, the main issue alone, and no point relating to the alleged lien was submitted to the jury, and the latter found only upon the main issue; hence the reading of the description to the jury could not have affected the verdict or result, was a harmless error, and is not a ground for a reversal.

This disposes of all the objections which are presented by the record upon the primary part of the case. We therefore find no error of fact or law in the verdict; nor any error in the judgment rendered below, so far as it is a general and personal judgment, and, to that extent we affirm it.

The district court has full jurisdiction upon its law side to administer a mechanic's lien; the explicitness of the statute to this effect obviates the necessity of exposition. But the court below acquired no jurisdiction to administer one in this case. The petition, by way of presenting to it a subject-matter—having set forth the claim for labor and materials, alleged, "Said labor being done, and materials furnished upon a certain dwelling house of the defendant, de-

Opinion of the Court—Peck, J.

scribed as being one and one-half story log dwelling house, situate on the southeast quarter of the southeast quarter of section number four, township number fifteen, range number seventy-three west, and claimed by the defendant, in the county of Albany and Territory of Wyoming." The allegation unmistakably states the house, as the only property claimed by him; and is the only allegation, employed to present any property, as subject to the alleged lien; therefore, the petition does not attribute to Fein any ownership in the land, on which the house is described as situated, nor any right of removal; if he had no right of removal his ownership of the house, being intangible to himself, was inaccessible to the law, and there was no subject-matter before the court, on which to enforce a lien; if he had a right of removal, it attached only to a movable fixture,—personal property, and the enforcement of a lien upon personal property must, in the first instance certainly, be attempted by the creditor without the aid of the court, it being for the court to administer a lien in the first instance only against the realty; a comparison of sections one, five and ten, of the Act of December 1, 1871, at pages 459 to 461, of the Compilation, makes clear this distinction between the personalty and the realty as to the different methods of enforcing a lien. The district court rendered judgment for the plaintiff below for the amount of the verdict and costs, which is the general and personal part of its judgment; and in continuation adjudged that, in case of non-payment of the damages and costs within thirty days, "*the premises described in the petition*"—thus inserting in the judgment order, as a description of them, the description which I have recited from the petition—be sold to satisfy the judgment.

The assignment of error that the facts set forth in the petition, were insufficient to sustain the judgment, is true to the extent of the lien portion of the judgment. It is also observable that the order of sale embraced the premises whereon the house stood, and neither petition, proofs nor order identifies them, as well as the house, and therefore

Opinion of the Court—Peck, J.

beyond the latter was impracticable as well as excessive; and we do not decide but that that rendered the entire order void, even if it would have been valid had it been confined to the house. The judgment, so far as it is a lien-judgment, is reversed; and, so far as it is a general and personal judgment, is affirmed; and stands modified accordingly. No costs of appeal are allowed to the defendant in error; costs of appeal are allowed to the plaintiff in error, and are to be deducted from the judgment, above affirmed.

The petition shows that Davis withdrew his lien-notice from the register's office, and filed it in the district court. It does not disclose whether there were or were not other lien-holders, and therefore does not disclose that there were no other lien-claims, to be administered upon under sections five and six of the lien-act in connection with the lien claimed by Davis. Whether this withdrawal of the lien-notice destroyed the lien, provided one had been acquired, and this omission to allege as to the existence or non-existence of other lien-holders were jurisdictional, we do not decide.

Whether, if the court had jurisdiction, Davis proved a lien by simply reading an alleged lien-notice, filed with the petition, and constituting parts of it, and the judgment sustaining the lien, would not have been open to the objection of insufficiency of evidence, is a question which we do not decide.

Judgment modified and affirmed.

Statement of Facts.

BEAUCAIRE v. SAWYER ET AL.

DECREE : MODIFICATION.—There were three defendants, but the district court by inadvertence rendered a decree against one alone, and an appeal was taken as to two of the defendants only. *Held*, that if the appeal had been taken against all, the decree would have been modified into a decree against all, but as it had been taken against two of the defendants alone the decree could only be modified into a decree against them alone.

APPEAL from the District Court of Laramie County.

Beaucaire and Sawyer formed a partnership on or about December 1st 1874, to engage in the barber and photograph business in Cheyenne: they contributed equally to the partnership fund and the profits were to be equally divided. On the 7th of March 1876, they made a full settlement of their partnership accounts to that date, which showed a balance in Sawyer's favor of \$450, for which Beaucaire gave his note due in one year from its date, and that amount was thus taken out of the partnership account. In June 1876, Beaucaire sold the barber-shop branch of the business for \$400, receiving and appropriating to himself the price. In October 1876, Sawyer sold the photograph branch of the business to P. C. Hoffman for \$500, receiving and appropriating to himself the price; afterwards and before this suit Hoffman returned the property to Sawyer, and the latter and D. D. Dare converted it into stock for a new photograph firm.

On the 19th day of October 1876, Beaucaire filed a bill for an accounting; making Hoffman and Dare parties defendant. The defendants filed their answer on the 20th day of November 1876. The district court having heard the case, rendered a decree in favor of the complainant (Beaucaire) for \$478.82½ from which decree Beaucaire appealed, claiming that the amount decreed him was insufficient.

Syllabus.

W. P. Carroll, for appellant.

E. P. Johnson, for appellee.

FISHER, C. J. Beaucaire, the orator, appeals from the decree, which was passed by the district court for him, claiming that the amount decreed to him was insufficient. The decree is affirmed as to its amount with costs of the appeal. That decree should have been passed against all of the defendants, but by inadvertence was rendered against Sawyer alone; and had the appeal been taken against all, the decree would have been modified into a decree against all; but, as it has been taken against Sawyer and Dare alone, it is modified into a decree against them alone.

The records of the appeal were allowed because it was proper for Beaucaire to come here to obtain a correction in the decree below, so as to make it operate against Dare.

Decree affirmed.

CASTLE v. THE BOARD OF COUNTY COMMISSIONERS OF UINTA COUNTY.

LEGISLATIVE POWER.—The organic act gives the legislature power over all proper subjects of legislation, and in the absence of an express limitation upon this power, the legislature may pass laws fixing a standard of fees for the officers of the several counties within the territory, no two of which are exactly alike. Such a law is no breach of contract.

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

E. A. Thomas and *Johnson & Potter*, for plaintiff in error.

Argument for Defendants in Error.

Plaintiff denies the validity of the act of the legislature, as being unequal, discriminating and partial. Cooley's Const. Lim., page 389-397. The fees allowed county officers are necessarily collected from the people in the way of taxes, and the result is unequal taxation in the various counties, necessarily following the unequal and unjust discrimination. Cooley's Const. Lim., 501-2; Cooley on Taxation, 124 to 174.

The Act of '77, by its title and enacting clause, refers only to county officers. Laws of '77, p. 112; while justices of the peace are precinct officers. Comp. Laws, page 218, Sec. 1; Potter's Dwaris, page 103. The law is unjust in that the officers were elected on the supposition they were to receive fees according to the Act of 1869, and the rate should not be changed during their continuance in office.

H. Garbanati, for defendants in error.

The organic act of this territory gives the legislature power over all proper subjects of legislation, and it did not exceed its power in passing the act approved December 15th, 1877, entitled, "An Act to establish the salaries of county officers of Uinta county and for other purposes."

FISHER, C. J. This case was brought to this court from the county of Uinta. The plaintiff in error, Christopher E. Castle, was a justice of the peace in and for the county of Uinta, residing in the town of Evanston. On or about the first of June, 1878, he presented a bill of justice's costs made up under the justice's fee bill passed by the legislature of Wyoming Territory for the session of 1869, charging for services, as such officer, in hearings had in criminal cases.

Upon the presentation of the bill, the board of county commissioners, to whom it was presented, refused to allow it or to draw their warrant for its payment. Mr. Castle appealed from the action of the board, as provided for by the laws of this Territory, and having duly perfected his

Opinion of the Court—Fisher, C. J.

appeal, at the July term of the district court in and for Uinta county, the case was tried by that court and a jury; after the evidence had all been submitted, the following request was made for an instruction to the jury, by the plaintiff's counsel: "In this case the jury are instructed that this action having been brought to recover for services rendered the county of Uinta by the plaintiff, as justice of the peace in said county, and the same having been against the county under the fee bill instead of under the act allowing salary, the question of the right of the plaintiff to recover depends upon the validity of the legislation of the late session of the legislature, providing a different rate of compensation in different counties of the territory, for the same service.

"The court instructs you that such unequal legislation is beyond the power of the legislature to enact into law, and the law so passed being a nullity, it follows that the plaintiff in this case has a right to recover fees legally charged under the general fee bill providing compensation for services rendered by the various county officers of the territory;" which request was refused by the court. The court then on the request of the defendant instructed the jury as follows:

"The act passed December 15th, 1877, is the law governing the compensation of justices of the peace within the county of Uinta and the town of Evanston, and the plaintiff is not entitled to recover in this action."

To the refusal to give the instruction requested by the plaintiff, and to the giving that requested by the defendant, the plaintiff duly excepted. The jury retired and returned a verdict for the defendant. After which the case was regularly brought here by a writ of error.

In giving a history of the case we have been careful to embody all the facts involved so that a clear understanding of it may be had.

The legislature at its session of 1877, passed a series of laws fixing a standard of fees for the officers in the several

Opinion of the Court—Fisher, C. J.

counties, no two of which are exactly alike in amount, although in each the general fee bill has been abolished and provision made to pay salaries; the various officers being required to turn over all fees which may be received by them, to the various county treasurers, the fees to be charged still being as provided for under the fee bill of 1869. In this particular case the plaintiff in error was to have a salary of \$600. Now it is claimed that the legislature exceeded its power in passing laws of this nature, and especially in passing the act approved December 15th, 1877, entitled, "An act to establish the salaries of county officers of Uinta county and for other purposes."

This is the only question involved in this action. That this, and the various laws of the legislature of 1877 may be regarded as improper legislation we are not called upon to decide; the only question submitted to us is, had the legislature the power to pass this law? Why not? It is said that in the passage of this law a breach of contract is involved, from the fact that the incumbent entered upon his duties under the existence of a regular schedule of fees as found in the fee bill of 1869, and that the present law may diminish or increase the allowance, hence the breach of contract.

The precedents for this kind of legislation are so numerous that it is unnecessary to spend time and labor to meet this objection: and to give it any force, it must be settled either in the law, or provided for by constitutional limitation. Thus the constitution of the United States provides that the salary of the president shall not be increased or diminished during his term of office. Such provision is also made in some of the state constitutions, in regard to their governors and judges; but in the absence of such provision we have no doubt of the power of the legislature to regulate all questions in relation to the fees of officers. The organic act of this territory gives the legislature power over all proper subjects of legislation, and whether in this case they have

Statement of Facts.

used this power wisely or not, we have no doubt of their power in the premises.

The judgment below is affirmed, and a procedendo awarded for costs against the plaintiff in error.

Judgment affirmed.

CARR v. RYAN.

FRAUDULENT CONVEYANCES.—Where a party executes a mortgage upon his personal property, without consideration, and without a change of possession, and for the sole purpose of hindering and delaying his creditors; such a conveyance is fraudulent and void, and the mortgagee acquires no rights under the mortgage upon which he can base an action. The creditors of the mortgagor may levy upon and sell the property covered by the mortgage.

ERROR to the District Court of Laramie County

The plaintiff in error in his official capacity as sheriff levied upon the property in controversy, by virtue of an execution against J. D. Brasel at the suit of one Sanford, and, as the property of Brasel, defendant in error replevined the property, basing his claim to it upon the ground:

1—That he was a mortgagee of the property.

2—That he was in possession under a verbal agreement, the effect of which possession and agreement was to constitute the property a pledge for the purpose of securing an indebtedness then existing in his favor against Brasel, the pledgor.

His right to maintain the action rested mainly upon the latter ground, as the mortgage was not then due. The court found in favor of defendant in error.

W. R. Steele and *E. W. Mann*, for plaintiff in error.

Upon the trial in the court below the plaintiff sought to maintain his action upon the ground that he was a mort-

Argument for Plaintiff in Error.

gagee in possession of the property and therefore entitled to bring the action against the sheriff.

The defendant claimed that the plaintiff was not in possession, and that under the terms of the mortgage he was not entitled to the property in controversy, and therefore could not maintain this action.

The questions presented in this case depend almost entirely upon the evidence introduced upon the trial in the court below, and no separate argument upon the assignments of error will be necessary.

It appears from the testimony of the plaintiff that a mortgage of the property in controversy was given to him by J. D. Brasel. The plaintiff also testified, in his direct examination, that the mortgage property was delivered to him by J. D. Brasel. But upon cross-examination the following facts are made to appear :

1. That at the time of the commencement of the action Ryan was in Brasel's employ, driving a team.

2. That Ryan was paid wages by Brasel and that a portion of the money Ryan received for the work of the team was applied on his wages and the residue paid to Brasel.

3. That Brasel furnished a stable and feed for the team.

4. That since the commencement of the action the team in controversy had been worked by Brasel and that Ryan had received no compensation for the work.

It also appears from the testimony of E. H. Ingalls, that Ryan stated, previous to the commencement of the action, that the team he was driving belonged to Brasel. The testimony of the witness, Brasel, denies all the material statements heretofore referred to as appearing from Ryan's testimony, except the one in regard to the delivery of the property to Ryan, and the one in regard to the team in controversy having been used by Brasel since the commencement of the action. Brasel also attempts to show that he has paid Ryan something for the use of the team, but is unable to state any particular amount. It is there-

Argument for Defendant in Error.

fore submitted on behalf of the plaintiff in error that the only testimony to support the case of the defendant in error is that of the witness J. D. Brasel. That his testimony is contradicted by that of the defendant in error and by the mortgage introduced in evidence. That the mortgage is the written contract of the parties, and, being recorded, is the one upon which the plaintiff in error had the right to rely in making his levy.

When by the terms of the mortgage the mortgagor is entitled to the possession of the mortgaged property, as against the mortgagee, until after condition broken, the mortgagee cannot maintain the action of replevin against a third party taking possession of the property, until after condition broken. *Frisbee v. Langworthy*, 11 Wis., 393; *Saxton v. Williams*, 15 Wis., 320; *Hull v. Carnley*, 11 N. Y., 501; *Curd v. Wunder*, 5 O. St., 92. It is therefore submitted on behalf of the plaintiff in error that the judgment of the district court should be reversed, with directions to render judgment for the defendant in the court below.

W. P. Carroll and Johnson & Potter, for defendant in error.

The mortgage stipulated, that until default in payment the mortgagor should remain in possession; but that stipulation was obligatory only in favor of mortgagor, and the right to the possession was a privilege which would not pass to the assignees of the mortgagor or his attaching creditors, in absence of such stipulation by mortgagee. The testimony of both parties to the contract shows the property was finally, and before levy, turned over to defendant in error by Brasel, as a pledge to secure his debt, and if so, of course he had the right to the immediate possession, and the levy of the sheriff was an unlawful invasion of his rights, and the sheriff's detention wrongful. 2 Pars. on Contracts, page 108 to 121; *Id.*, page 119; Story on Bailment.

The findings of the court take the place of the verdict of the jury. Where a question is fairly submitted to the jury on a conflict of testimony the verdict will not be disturbed. As to the rule established by this court, see *W. U. T. Co. v. Monsear*, 1 Wyo., 17; *Bank v. Dayton*, 1 Id., 336; *Byrne v. Myers*, 1 Id., 352.

PECK, J. This is an action of replevin by Ryan against Carr. The petition is in common form, for the wrongful detention of two horses, a wagon and double harnesses from Ryan as the owner, and as entitled to the immediate possession of the property. Carr admitted the detention, but justified it by having taken the property under an execution, issued from the first district court against one J. D. Brasel to himself the sheriff of Laramie County, and holding it under that levy, alleging that at the time of the levy, Brasel owned the property, or had a leviable interest in it, or that it was subject to levy under the execution. Under the issue thus raised, the sheriff claimed that Ryan's possession was derived from Brasel, by an agreement void as to creditors, because intended to hinder, delay and defraud them. This is the only proposition that we shall consider in disposing of the judgment below, which was rendered for Ryan on a trial without a jury.

The testimony introduced by Ryan, consisting of a mortgage, his own and the evidence of Brasel, established the following facts, and subjects him to their legal effect. On and under date of the 14th of March, 1878, Brasel executed to Ryan a chattel mortgage of two double teams (of which one is the team in suit) and other property, conditioned to secure the payment of a note described as a note from Brasel to Ryan of the same date, due at one year, for \$650, and interest, conferring upon Ryan in case of default, full power to take possession of the property, convert it into cash, and apply the net proceeds upon the note, accounting to Brasel for whatever surplus there might be; and reserving to Brasel the

full right of use and possession of the property until default. The mortgage was duly acknowledged on the same day, and filed for record on the 26th day of the same March. The note was in part fictitious; when cross-examined, Ryan admitted with unmistakable explicitness, that it was \$100 in excess of its real consideration. Brasel was then insolvent, and this was known to Ryan; and sickness prevented the former from attending much to business. They testified in effect that, contemporaneously with the execution of the mortgage, and as a part of its transaction, it was arranged between them that Ryan should take possession and charge of the teams; and so retain them, until he had got out of them (which means out of their usufruct) the amount of the note; and that he took, and had since continuously retained possession and charge of them accordingly, excepting for about two days, when they were in Carr's possession under the levy. No other attempt at change of possession was made, than that Ryan took ostensible control of the teams, so far as to find work for them with outside customers or third persons, and to collect their earnings. When the mortgage was delivered, he was, and for about seven months next before, had been in Brasel's employment as a teamster at day wages, and so continued in his employment from the giving of the mortgage until the trial; during all this period, the teams were kept at Brasel's expense, the horses in his stable; the earnings from outside parties, Ryan applied to his wages and the care of the team, regularly handing the surplus to Brasel. As his teamster, drove or teamed with each of them, and when they were not out at work for third persons under hire for his benefit, they were at work for him on his premises; and Ryan neither received, nor attempted to obtain, nor was it the intention of himself or Brasel, that he should derive any benefit from, or apply any of the usufruct of them upon the note,—our unhesitating construction of these facts is, that there was no substantial or real change of possession from Brasel to Ryan; that Ryan's relation to Brasel in the matter was that

Statement of Facts.

of an agent to his principal, not that of a creditor to his debtor; that all that the former did about the teams after the giving of the mortgage, was, if ostensibly for himself, in fact for the benefit of the latter, and that the entire arrangement between those parties, and their action under it, were covinous in the interest of Brasel, were made and pursued with the intent to hinder, delay and defraud his creditors, and were therefore, void; consequently, the levy was good as against Ryan, and that he has no right of action.

The judgment is reversed with costs.

Judgment reversed.

FARRELL v. ALSOP.

SETTLEMENT: RELINQUISHMENT.—If upon a settlement a party relinquishes a just demand in order to obtain the settlement, he cannot afterwards claim the demand; the settlement is a consideration for the relinquishment.

EVIDENCE: OBJECTION.—If a party, against whom an objection as to evidence is made, is willing to waive a specification of the grounds the court is not bound to excuse the omission, and may disregard the objection.

ERROR to the District Court of Albany County.

This case was commenced by Alsop to recover a balance alleged to be due on a promissory note for \$575, given by Farrell to Alsop, November 13. 1874. Farrell denied indebtedness on the note and pleaded a set-off of \$700, on account. The reply denied liability on some of the items in toto, and claimed payment of the others in a settlement, of which the note sued on was the result. The court allowed two items of set-off and the plaintiff's claim, and rendered judgment for plaintiff

E. P. Johnson, for plaintiff in error.

S. W. Downey, for defendant in error.

Opinion of the Court—Peck, J.

PECK, J. On July 7, 1877, Alsop sued Farrell in the District Court for \$419.50 as a balance due on December 17, 1876, upon a note executed by Farrell on and dated November 13, 1874, payable to the order of Alsop at six months from its date, for \$575, the note being made at Laramie, in this territory; the petition also claims interest from December 17. The only defense made was by a plea of offset, in which Farrell alleged that Alsop was indebted to him in \$700 on the following account, namely:

1874, Aug. 4. To wife's expenses from Nebraska to Laramie city, as witness in the case of Hilton v. Alsop, - - - - -	\$150 00
1874, Aug. 4. To rent from C. D. Matty, from Oct. 11, 1874, to June 1, 1875, at \$15 per month, - - - - -	121 00
To one month's board for Frank Manard, while herding for Mr. Alsop, - - - - -	20 00
To 10 days' witness fees, Hilton v. Alsop, - - - - -	30 00
To 14 days' witness fees—wife—Hilton v. Alsop, - - - - -	42 00
To 4 days' witness fees—Davis—Hilton v. Alsop, - - - - -	12 00
1876, Dec. 17. To 100 head sheep, a \$3.25, - - - - -	325 00
	<hr/>
	\$700 00

In which plea Farrell further alleged that the \$700 became due on December 17, 1876; and asked judgment for that sum, with interest from that date, that the same might be set off against the amount found due to the plaintiff from the defendant upon the note; and that the excess might be adjudged to the latter.

The plaintiff below replied that on the 13th day of November, 1874, the parties accounted together as to all matters of account, then existing between them; including all the amount plead in offset excepting the items of \$121 and \$325; and that upon the accounting, a balance of \$575 was found due to him, for which the defendant executed

Opinion of the Court—Peck, J.

the note sued on; that as to the item of \$121, the plaintiff denied the allegations, of the plea of offset respecting it; and that as to the item of \$325, the agreed price for the sheep was \$300, and that it was paid by endorsing that amount upon the note on December 17, 1876, and that in his petition he had declared only for the amount of the note less that sum. Though the petition does not in terms show the endorsement, computation shows that the balance for which it claims recovery allows and calls for just that deduction, as made at that date. The case was tried without a jury, and the District Court found as facts, that on the 18th day of November, 1876, the parties had an accounting, that the note was executed as a result, that all the items specified in the plea of offset existed before the note was given, and were included in the settlement, except those for \$30, \$12, and \$325; that the \$30 and \$12 existed before the execution of the note, but were not embraced in the settlement; that as to the \$325, that item was for 100 sheep, sold and delivered by Farrell to Alsop on December 17, 1876, for \$300, not \$325, and that the price was endorsed upon the note; whereupon that court found, as a conclusion of law, that there was due to Alsop on February 13, 1876, the date of the findings, \$418.82. The defendant below moved for a new trial on the grounds:

1st. That the findings were not supported by sufficient evidence, and were against law.

2nd. That the court erred in admitting testimony against his objection.

The motion was overruled, and judgment rendered in favor of the plaintiff below, on February 19, 1878, for \$418.82 damages and costs: and an exception was taken to the order and judgment.

As that court found that the \$30 and \$12 items existed when the settlement was made, and were therefore correct, and as it also found that they were not embraced in the settlement, and therefore not in the note, it should have allowed them with interest; so that upon all the facts found

Opinion of the Court—Peck, J.

by it, the balance allowable to him was the note, less the endorsement and these two items, the interest added, at the date of the findings: computation shows that it intended to, and did allow to him that balance, as then due, in finding for him \$418.82 as due at the date of the findings. By complaining of this allowance, the first ground of the motion compels us to revise the evidence on which the allowance was based, and invites the consequence of the revision. Under the issue the burden of proving the original verity of the offset was upon Farrell; with respect to all its items, but that for \$325, as he claimed that they existed before the note was given, and admitted that that was given upon a settlement of accounts, the burden rested upon him, irrespective of any inference which the law might draw from the mere execution of the note in the absence of all proof of settlement; hence he was under a double burden. The parties agree that the item for \$150 was originally correct, and was an absolute debt, due at its date, August 4, 1874, and therefore, when the note was given, so due, and with interest; Alsop testifies that it was allowed in the settlement, Farrell that it was expressly excepted from it; he explains the exception upon reasons which are at once inconsistent and absurd, and admits that he thus purposely and unnecessarily executed a negotiable note for \$157,—the interest on the \$150 added—beyond his liability; the execution of the note corroborates Alsop and discredits Farrell; we necessarily conclude in favor of the former as to this item. Had it been our duty to pass upon the items of \$121, \$20, \$30, \$42 and \$12, in the first instance, we should have hesitated to believe that they accrued; but accepting Farrell's claim that they did, we find that he knew in excepting them from the settlement that he would be unnecessarily giving the note for more than \$225, interest added, beyond his liability; he testifies that the items were expressly excepted from the settlement, and for reasons as absurd and inconsistent as before; Alsop that they were included: the execution of the note corroborates

Opinion of the Court—Peck, J.

Alsop and discredits Farrell; we necessarily conclude in favor of the former in this particular. If upon a settlement a party relinquishes a just demand in order to obtain the settlement, he cannot afterwards claim the demand: the settlement is a consideration for the relinquishment.

Henry Wagner was produced by the defense to impeach Alsop with respect to declarations as made by him on two occasions, about the offset, but the witness was not present when one of the alleged conversations took place, and had forgotten what was said on the other occasion: so that he did not impeach Alsop.

With regard to the \$325 item the state of the pleading on the part of the defendant admits the existence and correctness of the note, and the correctness of the balance for which a recovery is claimed in the petition, with interest from December 17, 1876, and claims the benefit of a deduction on the original principal of \$300, as of that date; the parties agree in this evidence, that the sum was then endorsed in payment of the agreed price of the 100 sheep, which are charged at the same date in the offset account at \$325: it is thus apparent that the true figure was \$300, and as it was correctly endorsed, it should not have been charged in offset.

In arriving at this conclusion we allow to Alsop no benefit from the fact that a copy of the note purports to have been filed under his petition, showing an endorsement of \$300 on December 17, 1876, for the transcript does not show that the copy was filed before the issues were closed, and therefore the filing of the copy can be no element of admission against Farrell.

We hold that the whole weight of the evidence was against the allowance of any of the amount, and was in favor of the allowance of the note and interest, less the endorsement; therefore that the findings should have allowed to Alsop, as of February 13, 1878, \$477.66, to which sum the judgment below should be modified; unless the second ground of the motion can be sustained.

Opinion of the Court—Peck, J.

The defendant below excepted to two rulings of the court, one against his objection to the admission of evidence, the other against his motion to strike out evidence; no ground was specified for either objection, and each ruling was correct. If a party against whom an objection as to evidence is made, is willing to waive a specification of the ground or grounds, the court is not bound to excuse the omission, and may disregard the objection. It is due to the court that the objection should be thus explained, when taken, because the explanation tends to guard the court from the commission of error. This is the common law rule, is well stated and explained in 3 House of Lords' cases at page 16, *Bain v. Whitehouse and Furness Junction Railway*, and obtains in the federal practice.

The defendant below having rested, the plaintiff below produced in rebuttal evidence, which was correct for that purpose; the defense objected, because the plaintiff would not introduce his case piecemeal; the objection was overruled, and an exception taken. The objection referred to the fact that the plaintiff first introduced evidence: this was premature and unmethodical, because the opening was with the defendant; the court was not obliged to permit it, and we think that as a matter of discretion it should not have done so; and had the defendant objected, it would have been erroneous to have done so; the defendant did not object and we cannot see that, by irregularly assuming the initiative, the plaintiff waived his right of reply; it seems to us that, by consenting to his so doing, the defendant conferred upon the plaintiff the right of reply, as a necessary incident. We hold that the objection was not sound.

Alsop swore that \$300 was the agreed price of the sheep at \$3 a head; Farrell that that was to be the price on a condition that was not fulfilled; and in rebuttal, the former produced a witness to prove what the latter stated as to the price on the occasion of delivery of the sheep, to the admission of which evidence objection was made, on the ground that no foundation had been laid for its introduction, mean-

Syllabus.

ing apparently that Farrell's attention had not first been called to the statement, which it was proposed to show; the objection was overruled, and an exception taken: what the evidence was to be was not explained; if it had no tendency to impeach Farrell, it could not harm him, if it had it was unnecessary to call his attention to the statement in advance, he being a party: hence the objection was unsound.

Also was offered in rebuttal to contradict Farrell as to the \$121; the evidence was objected to as being a re-examination, admitted, and an exception taken. It was a re-examination of the witness, not in repetition, but strictly in rebuttal, and taken literally, the objection is useless; but it apparently meant that the examination was piecemeal, he having been examined in the opening upon the item; for the reason stated in answer to a like objection taken to another part of the evidence, this objection was unsound.

This disposes of all the objections, which were made by the defence below, to the introduction of evidence.

The judgment is modified, and is to be re-entered in the district court as a judgment of February 13, 1878, in favor of the defendant in error for \$477.66 damages, and the costs as already taxed at \$; he is also allowed the costs of the appeal, but not the five per cent. applicable to a dilatory appeal.

Ordered accordingly.

FALLEN v. FERRIS.

PRACTICE: WRIT OF ERROR: RETURN.—The Supreme Court will permit delays in the return of the writ of error, for the purpose of securing to the plaintiff his appeal, bringing up the record, and disposing of the case according to the rights of the parties; but this permission is extended only, where it perceives no intention on his part to abuse the process; when, therefore, it discovers that intention, its duty is

Opinion of the Court—Peck, J.

the reverse. The writ of error, as a writ of right, is limited by this condition, and the court should impose the limit. Its power for the purpose is inherent.

ERROR to the District Court of Laramie County.

The facts are sufficiently stated in the opinion.

W. P. Carroll, for plaintiff in error.

Johnson & Potter, for defendant in error.

PECK, J. The present writ of error, issued at the instance of these plaintiffs on the first day of March, 1879, to the judge of the First District Court for the record of a judgment, which had been rendered there: and on the 22d day of April, 1879, was returned into this court by that judge unanswered, but with, endorsed thereon, the certificate of the clerk of his court explaining, as follows, why he had not answered the writ, namely: that it was received on the first day of March, and in obedience to it a transcript of the record was made at the request of the plaintiffs in error on the eleventh day of March, but that they refused to pay the transcription fees, and the writ was accordingly returned without the transcript. The defendant moves upon all the proceedings, which are before us, for an affirmance of the judgment, and for other meet relief, filing under the motion a transcript of that record. The plaintiffs appear, concede the verity of the certificate, and ask that the motion be denied.

This court will permit delays in the return of the writ of error, for the purpose of securing to the plaintiff his appeal, bringing up the record, and disposing of the case according to the rights of the parties; but this permission is extended only, when it perceives no intention on his part to abuse the process; when, therefore, it discovers that intention, its duty is the reverse. The writ of error, as a writ of right, is limited by this condition, and the court should impose the limit. Its power for the purpose is inherent.

Opinion of the Court—Peck, J.

In the present case the plaintiffs, having obtained the process, abused it, by attempting to prevent its being answered and returned. Asking for the denial of the motion, they ask to have the process left in their control, left locked up; the consequence of which would be at their will to suspend the bringing up of the record, and the function of the court to revise, and to indefinitely harass the defendant. This would be a consummation of the abuse. As the record is now before us, the case can be heard, and the rights of the parties be subserved, the same as if the plaintiffs had not obstructed the process; the only difference being the form of proceeding; they may not complain of this.

The plaintiffs next ask that if the motion be not denied, it be granted only so far as to dismiss the writ. But two-thirds of the appealing year remains to them in this case, and in every instance of such a motion more or less of it may remain; and if, as fast as a writ of error is dismissed by us, the plaintiff can, as a matter of right, take out another, such abuse of the process can be indefinitely repeated, which would be but an aggravation of what we are now compelled to condemn, and our only means of guarding against it is by such an order as is above indicated; and, if the matter of right is exhausted by the issuance of the first writ, and a subsequent one can be obtained only on leave, such an order will accomplish for the plaintiffs all that can be obtained by another writ.

The order will be granted.

Judgment affirmed.

Syllabus.

P. WARE, JR., ET AL., v. JOHN WANLESS ET AL.

ASSIGNMENT.—A provision in an assignment which reserves any of its assets to the debtor before full payment of creditors, vitiates the instrument whether the reservation be provided for by coercive terms or not.

IDEM.—An assignment which contains coercive terms, whether their aim is to provide a reservation or not, vitiates the instrument *a fortiori*, if they do aim at a reservation. The debtor cannot prefer himself to the creditor in respect to the assets, and a provision in the assignment which tends to secure, is a provision which does not secure that preference, but renders the assignment void.

FRAUD.—Where an assignment exhibits on its face constructive fraud, that feature cannot be overcome by proof that there was no fraud in fact, and parties to the instrument are estopped from alleging good faith against its import; fraud in law is as fatal as fraud in fact, and equity will not sever the elements of fraud from the instrument, and give effect to the rest. The rule at law and in equity, is to treat the assignment, if fraudulent, as void *in toto*.

APPEAL from the District Court of Albany County.

The facts are stated in the opinion.

Johnson & Potter, C. W. Bramel and I. P. Caldwell,
for appellants.

Judgment creditors stand in a position to dispute the validity of the assignment, and call upon the equity arm of the court for the interference with the assignment sought, and the relief prayed for by them. *Burrill on Assignments*, page 597. The assignment is void as to the complainants, for two reasons:

1.—The coercive provision whereby creditors must release all or receive nothing.

2.—The resulting benefit to the assignor in case the creditors refuse to be coerced.

Whereby the assignment upon its face appears to be an assignment for the benefit of the assignor, instead of an

Argument for Appellees.

assignment for the benefit of creditors, and a fraud in law. Burrill on Assignments, pages 156 to 196; *Id.*, 394 to 432; *Id.*, 435 to 448; *Howell v. Edgar*, 3 Scam., 417; *Hardin v. Osborne*, 60 Ill., 93; *Barney v. Griffin*, 2 N. Y., 365; *Ingraham v. Wheeler*, 6 Conn., 277; *Atkinson v. Jordin, Ellis & Co.*, 5 Ohio, 289; *Brown v. Knox*, 6 Mo., 302; *Gardner v. Cole*, 21 Iowa, 205; 5 Cow., 547; *Glover v. Wakeman*, 11 Wend., 187; *Brashear v. West*, 7 Pet., 608; *Tutt, Bros. & Co.*, v. *Caldwell*, 3 Minn., 364; *Coolidge v. Melvin*, 42 N. H., 510; *The Watchman*, Ware, 232; *Stewart v. Spencer*, 1 Curtis, 157; *Compton v. Gilbert*, 5 McLean, 117; *Miller v. Conklin*, 17 Ga., 430; *Burk v. Murphy*, 27 Miss., 167.

An assignment void in part is void *in toto*, and creditors are entitled to proceed from the point at which they were stopped by the assignment. Burrill on Assignment, 600-601; *Sheriff v. Manning*, 2 Mich., 446; *McClurg v. Leekey*, 3 Penrose & Watts, 83; *Goodrich v. Downs*, 6 Hill, 438; *Austin v. Bell*, 20 John, 441; *Hysolph v. Clarke*, 14 John, 458.

Brown & Brockway, for appellees.

It may be that the deed of assignment is ambiguous, and uncertain in its terms; and if it is, it may be explained by oral testimony, or helped by the ordinary rules of construction, and will be so construed as to make it available for the purpose intended, rather than to destroy it. See Burrill on Assignments, page 374 and note; 22d Wendell, 483 and 488; *Coverdale v. Wildee*, 17th Pickering, 181; 11th Wendell, 187 and 192; 15th Barber, 618.

A deed of assignment is not void because it tends to hinder, delay, etc., under the statute of Elizabeth; it must have been made with *intent* to hinder, delay, and defraud, etc. See Burrill on Assignments, pp. 408, 409 and 410.

Where the deed is fraudulent "in fact,"—it is quite generally held void "in toto,"—and not good for any purpose whatsoever; but there is a very important distinction

Argument for Appellees.

between deeds fraudulent "in fact" and fraudulent by "construction." See 2 Tucker's Com., [443] 432.

Where fraud may arise "constructively" from one provision in a deed only, and is not clear and certain, oral testimony may be offered to explain or qualify it. See Burrill on Assignments, secs. 345 and 346, 18 Ala., 741; *Green v. Banks*, 24 Tex., 508; *Cunningham v. Freeborn*, 11 Wend. 240. Deeds constructively fraudulent, because of some bad provision, may be void in part, and valid as to all the rest. See *Pinneo v. Hart*, 30 Mo., 561; *Keyser v. Heavenrich*, 5 Kan., 324; *Macintosh v. Corner*, 33 Md., 607.

The only pretence of fraud in this case arises from a single paragraph in the assignment, found on page 99 of the record, from which it is claimed there is an effort to hinder, delay, and coerce the creditors of the assignor, and for that reason is fraudulent and void at common law.

If the paragraph referred to can be so construed, then we say it is not fraudulent and void at common law, but such stipulations for release are approved by the common law, and assignments containing the same are adjudged valid. See Burrill on Assignments, pp. 408, 409 and 410, and notes; also page 156; *The King v. Watson*, and *James v. Whitehead*, there cited. It appears that stipulations for release, under statute of Elizabeth, always have been, and are now, adjudged valid in England. See Burrill, 156, above cited. Our legislature, in adopting the common law of England, include statute of Elizabeth as a part thereof. See Compiled Laws of Wyoming, page 193.

In adopting the common law of England as the rule of decision in Wyoming, they follow the rule of courts—*i. e.*: "When a state adopts the statute of another state, it also adopts the construction given thereto by the courts of that other state." See *Barnes v. Rettew*, 8 Phila., 133; *Rosvelt v. Marks*, 6 Johns. Ch., 266. Our court is bound, then, to follow the English decisions as their rule and guide in this case. See authority before cited, and *Livermore v. Bagley*, 3 Mass., 487; 6 Johns Ch., 52; *Tucker v. Okley*, 5 Cranch, 34.

Argument for Appellees.

But if you come to the United States for a construction of this statute, or to learn the common law, then we say that all cases, or nearly all, decided purely under a statute like ours, (the old statute of Elizabeth), hold that stipulations for release as a condition precedent to sharing in avails of assigned estate, are valid.

Among the states that hold with English decisions upon this question are: Maine, New Hampshire, Connecticut, Vermont, Rhode Island, Massachusetts, New York (prior to passage of Statute of Trusts), Pennsylvania, Virginia, North and South Carolina, and other states. 10 Watts, 309, *Bayne v. Wylie*, (Penn.); *Kevan v. Branch*, 1 Grattan, 274; *Pearpoint v. Graham*, 4 Wash. C. C., 232 (Virg.); *Niolon v. Douglas*, 2 Hills, Ch., 443; *LePrince v. Guillemont*, 1 Richardson's Equity, 187 (S. C.), and *Aiken v. Price*, Dudley, 50 (S. C.); *McCall v. Hinckley*, 4 Gill, 128, (Maryland); *Robinson v. Rapelye*, 2 Stewart, 86; *Rankin v. Lodor*, 21st Alabama, 380, and Id., 389; *Halsey v. Whitney*, 4 Mason, 206, 229 (Mass.); *Nostrand v. Atwood*, 19th Pickering, 281 (Mass.); *Hall v. Denison*, 17 Vermont (2 Washburn), 310; *Havens v. Richardson*, 5 N. Hamp., 113; *Fox v. Adams*, 5 Greenleaf, 245; 6 Id., 395; 2 Fairfield, 41 (Maine); *Dockray v. Dockray*, 2 Rhode Island, 547. And where the stipulation is a condition of preference only, the great weight of American authority sustains them. Burrill on Assignments, 2nd edition, page 173; 2 Kent's Com., 534, 693 and 694. Also 2nd edition Burrill on Assignments, pp. 156 to 173, inclusive.

Stipulations in deeds of assignments that have sometimes been held void, are such as make the right to share in the avails of the estate depend wholly upon execution of release, and the share going to such creditor, if he fails to execute release, to be paid back to assignor. For form of such release, see 2 Ed. Burrell on Assignments, pp. 156, 389, 390 and 642.

It will be seen from the form given by Burrill, that a stipulation, much stronger than the one in this assignment

Argument for Appellees.

(if this assignment contains a stipulation), is construed to be a *preference* of creditors only; and it also appears from the evidence in this case that this assignment was intended to prefer certain creditors by the stipulation, or what is called a stipulation, therein.

The worst that can be said of this assignment, is that it is ambiguous and uncertain, and, therefore, open to construction and explanation. Under such circumstances all the surroundings will be considered, and if there was no intent to defraud, and no wrong done by reason of the assignment, under rules of construction before cited, the assignment must be declared good. See 2 ed. Burrill, page 374.

It appears by the evidence in this case that all the debts of Wanless amount to about \$37,000. That creditors accepting assignment hold about \$34,000 of that indebtedness. That the claims of the complainants herein amount to about \$3,000, more or less. The assignment is good as to those accepting. Burrill, page 447. What is it complainants ask? They ask to be paid in full. The evidence shows that the probable avails to be distributed are about \$7,000.00 more or less. Deduct from that \$3,000, claimed by plaintiffs, and we have \$4,000, to divide pro rata on \$34,000.00. The parties accepting assignment are bound and must release, (if the court sustains complainants), for this small percentage, while the complainants are paid in full. There can be no equity in this, and when so much has been done under an assignment, courts of equity will go far to sustain it, because greater wrong will result from holding it bad. *Lippincott v. Barker*, 2d Binney, 174; Burrill, 169, and 170, 2d edition.

But the evidence in this case shows that at and on the date of the assignment none of these complainants were judgment creditors, but obtained these judgments thereafter, and that these judgments were never liens on the property in hands of the assignees. None but judgment creditors can assail an assignment, although fraudulent and

Opinion of the Court—Peck, J.

void. 2d ed. Burrill on Assignments, page 597. And they must have taken out execution and made it a lien on property assigned. *Mohawk Bank v. Atwater*, 2 Paige, 54; See also, 1 Denio, 190, *Hastings v. Belknap*; *Reubens v. Joel*, 3 Kernan, 488; *Berryman v. Sullivan*, 13 Smedes & Marsh, 65; *Caswell v. Caswell*, 28 Maine, (15 Shepley), 232; *Fox v. Willis*, 1 Manning, (Mich.), 321; 6 English, (Ark.) 411.

Under case made the complainants cannot maintain this action and have no rights in the premises; clearly not unless judgments obtained after deed was made without lien are sufficient.

PECK, J. Upon the first hearing of this appeal we were clear and unhesitating in our judgment, that it should be sustained. We have carefully attended to the diligent and earnest argument, made by the learned counsel of the appellees on the second hearing, but our judgment is unchanged; if there is a difference, it has been confirmed.

This is a bill in favor of the appellants against the appellees, brought in the second district court to vacate an assignment, made by Wanless to Fillmore and Hayford, as a fraud upon the Orators as creditors of Wanless, and to obtain satisfaction of their claims out of the property, delivered to the assignees under the assignment, and for general relief. Wanless did not defend; the assignees answered, the Orators replied, and proofs were taken. Upon the pleadings and proof, the district court passed a decree sustaining the assignment, denying the relief asked for in the bill, and allowing to the defendant costs; from which decree the Orators have appealed.

It is objected that the decree has not been excepted to, and therefore is not open to revision. The notice of appeal is an exception, bringing before us the merits of the decree, as the decree was against the equity claimed in the bill upon a matter of fact, alleged therein, conceded by the answer, and established by the proofs. In the body of the

Opinion of the Court—Peck, J.

decree, between the recital of the facts found by it,—among which are the conclusions that the assignment was not made to defraud, or to hinder or delay creditors,—and the decretal order is this clause, namely; “against which (meaning the conclusions of fact) no final objection is made by complainants.” The learned counsel for the appellees very intelligently claims nothing from the clause; it is as meaningless as it is novel, and we infer that it was inconsiderately inserted by the draftsman, and overlooked by the judge when he signed the decree. The Orators were not bound to anticipate an adverse decree, might not know of it when rendered, and were not obliged to notice till filed; then the necessity and right of exception to it commenced; as a prior objection would have been premature, the omission to make it was insignificant.

The case establishes the following facts. On the 17th day of December, 1875, Fillmore and Hayford received from Wanless a written assignment of all his assets, consisting of merchandise, furniture, demands and real estate, for the benefit of his creditors; the assignment contained full power for the conversion of the assets, and deduction for expenses and services prior to distribution, also a dividend clause, of which a copy is set forth below. The property was forthwith delivered under the assignment; and, as inventoried in it, amounted to \$19,510.88; the liabilities as stated in it, exclusive of interest, to \$36,692.64; the assignees admit that they received assets of the actual value of \$18,807.12; the liabilities were, exclusive of interest, nearly \$44,000. The assignees have realized from the assets in cash \$10,907.97, and they put their services and expenses, past and future, under the assignment at the maximum of \$4,118.17; acknowledging a net in their hands of \$6,789.80. When the assignment was executed, Wanless was indebted to each of the Orators; and for that indebtedness they severally obtained judgments in that court as follows: P. Ware, Jr., & Co., on the 9th day of February, 1876, for \$968.31 damages and costs; Copeland and Hartwell

Opinion of the Court—Peck, J.

on the same day for \$367.89 damages and costs, and the Wyoming National Bank on the 28th day of April, 1876, for \$1,178.61 damages and costs.

On the first two judgments executions were duly taken out and delivered to the proper officer, who demanded of the assignees sufficient property for their satisfaction, the demands were refused, and subsequently the processes were duly returned "no property found;" it does not appear that any execution was issued on the third judgment. The assignees refused to comply with the demand so made upon them under the executions, claiming that their title to the assets was paramount, and upon this claim they resist the bill. Since the execution of the assignment the real estate has been in litigation, and unavailable, as assets; the cash realized was from the personal property. Proofs were introduced by the defendants, and against due objection, if objectionable, to show that the assignment was executed and received, and that the assignees had discharged the trust in good faith. Neither of the Orators has assented to the assignment. The dividend clause is as follows: "and by and with the residue or net proceeds and avails of such sales and collections, the said parties of the second part shall first pay and discharge in full the several and respective debts, notes and sums of money due or to become due or for which they or either of them are sureties from the party of the first part to the parties of the second, the said several sums and persons or firms being fully described in a schedule hereto attached marked schedule 'B.' Second, by and with the remainder of said net proceeds and avails, the said parties of the second part shall pay and discharge all other debts, demands and liabilities whatsoever now existing, whether due or hereafter to become due, provided such remainder be sufficient for that purpose, and if insufficient, then the same shall be applied pro rata, share and share alike to the payment of said debts, demands and liabilities, according to their respective amounts, and the person or persons, company or corporation, creditors as aforesaid,

Opinion of the Court—Peck, J.

shall receive and receipt the same in full discharge and release of their respective claims, debts or demands.”

Between the drafting and the execution of the instrument, claims, which were intended to compose the preferred class B., were satisfied, so that, when the instrument was executed, all the creditors for whom it provided were nominally of the second or residuary class, as the classes were designated in the document, but which thus becomes the sole class.

The English common law in its enlarged sense, as embracing law and equity, became by the principle of colonization the fundamental jurisprudence of the American colonies, so far as it was adapted to their several conditions; when the colonies renounced their allegiance to the British government, and passed into states, that law with that limitation became the fundamental jurisprudence of the states. When the latter formed the Federal constitution, they embraced this law in the judicial power, which that instrument confers upon the Federal government, and thus under the constitution and anterior to statute it prevails, with the exceptions hereinafter stated, throughout Federal limits, as a basis of Federal authority; remaining in abeyance, until courts are provided by statute for its administration—for the states, under Art. 3, sec. 5, providing that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts, as Congress may establish—and for the territories, under that provision, and the further provision of Art. 4, sec. 3, requiring Congress to make all needful rules and regulations respecting the territories. That exception is of Louisiana and Florida, and arises under the principle of cession and the provisions of treaty.

This common law, on which the constitution is predicated, necessarily is not a compound of the law, as it applied in the several states at the adoption of the constitution, because the original had undergone changes by local usage and adjudication, in the process of its adaptation to

Opinion of the Court—Peck, J.

colonial conditions. Necessarily it is that unit of law, which prevailed in England—the English common law proper. And it was that law, as it stood manifested by English decisions, at the date of the Declaration of Independence, because till then appeals lay from the colonial courts to the King's bench, and from that tribunal to the House of Lords, where controlling decisions became, down to that period, the authoritative exposition of the law, and its conclusive evidence. But it was that English common law proper, as applicable to our condition as the American people. The organic act of the territory declares at section 16: "That the constitution and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory of Wyoming, as elsewhere within the United States," and at section 9: "That the supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the constitution or laws of the United States, or territory, affecting persons or property." Thus the act in form, and with unmistakable explicitness affirms, and, if a statute is necessary to that end, establishes the existence of the common law in its enlarged sense as the general and fundamental jurisprudence of the territory—subject to the limitations yet to be mentioned—and provides the courts, through which that law is to be administered. Section 6 declares that the legislative power of the territory extends to all rightful subjects of legislation, consistent with the constitution and the act; hence the only limitations upon the common law, as the jurisprudence of the territory, are the Federal constitution and statutes; territorial legislation cannot change it. British statutes declaratory of the common law, applicable to the national condition, and enacted before the severance of the mother government, enter under these organic provisions into the law of the territory.

For the general reason that the adoption of a foreign

statute includes the construction put upon it by the courts of the foreign government; and for the special reason that the English courts, down to that event, are the sole and supreme evidence of the common law—the construction given to those statutes by the English courts before the revolution also enter, under these organic provisions, into the law of the territory.

Section 17 of the act, declares that the statutes of Dakota, in force in Wyoming at the taking effect of this act, shall continue in force, until repealed by the legislature of Wyoming. But the organic act of Dakota contains the same provisions as to the common law, which are in the organic act of Wyoming; therefore there can be no Dakota statute, that affects the last mentioned provisions. The act of December 2, 1869, entitled “An act adopting the common law of England and certain declaratory and remedial statutes of said kingdom,” at page 193 of the compilation, provides that “The common law of England, as modified by judicial decisions, so far as the same is of a general nature, and not inapplicable, shall be the rule of decision in the territory.” As the office of a decision is not to make, but simply to explain the law, and a decision can be nothing but evidence of the law, the term “modified,” in the statute, is synonomous with the term “expounded,” and, though the decisions are not named, nor the period covered by them specified in the statute, the reasonable intendment is the English decisions, and the period ending with July 4, 1876; so understood and read, this provision merely reiterates the provisions of the organic act upon the subject.

The statute of December 2nd, next provides that declaratory statutes shall be rules of decision in the territory; if by this is intended statutes declaratory of the common law previously mentioned in the statute, and passed before the revolution—and so we understand its intention—it simply reiterates the provisions of the Organic Act upon the subject. It is not necessary to consider, and we do not consider the residue of this statute. It follows that the common law governs the assignment.

Opinion of the Court—Peck, J.

The 13 Eliz. C. B. excepting the absolute parts, also the third, which is the penal section, is as follows: "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practiced in these days, than hath been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs; not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

"Be it therefore declared, ordained and enacted, by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or of any of them, by writing or otherwise; and all and every bond suit, judgment, and execution, at any time had, made, since the beginning of the Queen's Majesty's reign, that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared or expressed, shall be from henceforth deemed and taken, (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, has in actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and relief, by such guileful, covinous, or fraudulent devices and prac-

Opinion of the Court—Peck, J.

tices, as is aforesaid, are, shall, or might be in any wise disturbed, hindered, delayed or defrauded,) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing, to the contrary notwithstanding.

“6. Provided also, and be it enacted by the authority aforesaid, That this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration, and bona fide law, fully conveyed or assured to any person or persons, or bodies, politic, or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.”

This transcribed portion of the statute is declaratory; is then not a newly created narrow rule, but the expression of a pre-existent principle, flexible to every case coming within its reason; and is as operative within the territory, as it is in England. We read the common law in the statute. Summarizing that law on the subject of fraudulent conveyances, it enumerates every form of transfer and every description of property, includes all conditions of assets, exempts no debtor; and condemns every transfer, into which enters a fraudulent design and delay, at the instance of a dissenting creditor. It follows, as a comprehensive principle, that the assets of the debtor are so far charged with the payment of his debts, that the law will frustrate any disposition which has been made of them with that design, and reclaim them for the creditor; that it is immaterial whether the debtor be solvent or insolvent; the assets transferred the whole, or but a part of his estate; or whatever be the form of transfer, or whether the intent be latent or potent, actual or constructive; the purpose is the index, that a *bona fide* and therefore valid transfer may

Opinion of the Court—Peck, J.

hinder and delay the creditor, and it is *bona fide*, when the hindrance and delay are merely incident to a place, which contemplates the entire devotion of those assets to the satisfaction of every claim according to its terms, the unconditional preference of the creditor over the debtor; but that the transfer is fraudulent and the repose voidable, when the hindrance and delay are incident to a place, which tends to swerve this attitude of the debtor and creditor, towards those assets, and which therefore, if upheld, necessarily embarrasses the latter's right to reach the property by legal process; for it is in that tendency that the law sees the fraud, and therefore the intent to commit it necessarily treats the tendency to work the result as conclusive of an intent to accomplish it. The law permits the preference of one creditor to another, but not if it involves a preference of the debtor to a creditor. Is this assignment obnoxious to the statute?

The dividend clause clearly provides that, in case of a deficiency of assets, the creditors shall receive and receipt in release of the balance of their claims; the assignees can pay only on that condition; the creditor must elect to assent or dissent before or on offer of the dividend; his acceptance works a release with or without receipting; paying without receipt, would be an excess of authority in the assignees and of right in the creditors, but would enure to the debtor as a discharge—the receipt being, not the discharge, only its evidence.

The proper interpretation of the clause is that, a creditor dissenting, either no dividend is to be made, and the entire net of the assets,—or only his *pro rata* passes into the surplus fund; the first of these alternatives is the proper construction, if the text is to be taken literally, because literally the assignees are directed, the assets being short, to make one sale of them, and with it to pay all the creditors, and all must receive the portion in full; and we think that the latter expresses the will of the assignor, for without applying, and certainly by applying the strict construction, that

Opinion of the Court—Peck, J.

is appropriate to an insolvent's assignment. We think that his purpose clearly was to obtain a full discharge, or to keep the property; his will would govern the assignees so that they could neither change the rate by paying the dividend of a dissenting to an assenting creditor, nor pay one, without paying all. Whichever of the two interpretations applies, the principle is the same in the direct tendency of the assignment to hinder, delay and defraud creditors; sustain it, and the creditor is placed in the power of the debtor, whose will becomes coercive; assenting or dissenting, his right is sacrificed; he is constrained to the choice of relinquishing an unpaid balance, for the sake of getting a dividend, however nominal, or of foregoing the dividend in order to protect the balance; of abandoning one part to save the other, though both parts are equally due. Thus the debtor can either secure a bankrupt's discharge upon his own terms, or retain his property, and with such a power would never fail to shape his assignment accordingly, and the stimulus to prefer himself to his creditor would be increased just in proportion to the desperateness of his condition. Thus the theory of a lawful assignment would be completely reversed, for its primary purpose would be to promote the interest of the debtor to the right of the creditor, and the law would be turned into a rule, not for the protection of the latter, but for the escape of the former.

It is insisted that a proper interpretation requires the dividend of a dissenting creditor to be paid to the assenting creditors, until they shall have been paid in full; that the dividend clause would thus operate as a preference among creditors. The clause, so interpreted, would so operate, but that preference would involve a preference of the assignors over the dissenting creditors; and the assignment would lead to the same effect, and be open to the same objection, attributable to either of the two interpretations, which we alternatively give to the dividend clause; for on the one hand the motive to refuse would be common to all the creditors, and on the other the total of the rejected and

the total of the paid dividends might exceed the total of the claims of the seeming creditors,—and so in either case the direct tendency would be to create rejected dividends for the surplus. Fraud is none the less fraud, that it takes a circuitous path; it is the duty of the law to track it out, and stop it, whatever may be its path.

The counsel for the defense informs us that the English reports contain no case prior to 1791, condemning such an assignment; but that counsel has produced to us no case in those reports, we have searched and found none, and we believe that none exists before that date, sustaining such an assignment; the absence of a sustaining decision is most significant that until that date the law in England was held to be the other way; and its explanation is to be found in the simple fact that the statute was at its date the supreme evidence of the state of the law, and the continued existence of the statute is conclusive of the continued existence of the law, for the attempt of an English court to sustain such an assignment would be an attempt to nullify the statute.

The appellees rely upon the cases of *Jackson v. Lornes*, 4 T., 166, decided in 1791, and *Rex v. Watson et als.*, 3 Peire, 6, decided in 1816, as justifying such assignments at the common law. In *Jackson v. Lornes* the debtor, his assignee and some creditors executed an assignment, conditioned for a release on the payment of such dividend as the assets would yield, and the contract was thus valid as to the parties; one of the creditors signed upon a secret agreement with the debtor for the payment conditionally of his entire claim, subsequently sued the debtor upon the secret agreement, and the latter defended, and obtained judgment on the ground of the fraud, so committed upon the co-signing creditor; thus the case neither did, nor could, present a question as to the validity of the releasing clause. In the *Rex v. Watson et als.*, the assignment contained a like clause, the case directly presented the question of its validity, and the court sustained the instrument, but by a

per curiam decision, containing little more than its conclusion—a single reason,—namely, that, to disturb the assignment, would be to discourage a beneficial method of distributing an insolvent's estate; if the case was decided at common law, it is simply advisory to us (for no English decision, rendered after July 4, 1876, is authoritative to us), and, as advisory, it is of the feeblest character; an advisory decision of even extraordinary energy, which attempted to turn a current of law, that had been flowing in one direction for more than two centuries, would be unworthy of respect. *Rex v. Watson et als.* has been repeatedly and with great emphasis condemned in American courts. Burrill at page 156 of the second edition of his work on assignments, under the head of stipulations for release, says such stipulations continue to be inserted in the forms now used in England, referring to *James v. Whitehead*, reported in 20 L. J. Rep., N. S., 217, and 5 Eng., L. and E., 481; the case is not accessible to us, but we infer that it involved no decision on the subject, and whether it does or not is immaterial; such a form, is not a statute form, has no sanction in the English courts, as a common law instrument, earlier than 1816. We conclude that at the English common law, as it stood on July 4, 1876, this was a voidable assignment.

Both parties cite from the Federal courts. In *Pearpoint & Lord v. Graham, et al.*, 4 Wash. C. C., 232, decided upon the third circuit in 1818, the assignment called for a release; Judge Ware in *The Watchman*, Ware's Rep., 234, refers to it as supporting such an assignment, but Judge Story in *Halsey et al. v. Whitney et al.*, 4 Mason, 230, says that the case is not in point as a decision on the subject; and an examination of the case clearly justifies his remark; the instrument also contained a provision, that each creditor should release within sixty days; Pearpoint & Graham, a creditor firm, executed a release accordingly, and, the other creditors not having executed such release, brought the suit in equity for payment in full to the exclusion of the other creditors, making them parties, in order to out

Opinion of the Court—Peck, J.

off their claims, and Graham, the assignee, he having accepted the trust; the defendant creditors were not parties to the contract, and therefore not entitled to its benefit, nor were they attaching it; it was valid between its parties, the Orators were one, and claiming its benefit, and in that only their right *inter parte* and the court decreed accordingly to the theory of the bill; in the opinion Judge Washington uses expressions, which taken abstractly may indicate that he considered such a condition in an assignment as valid against dissenting creditors, but interpreted by the points that required decision,—and this is a necessary index in the interpretation of a judicial opinion, by which to separate dictum from decision,—could only signify that the assignment bound its parties, for the present question was not before him. In *Halsey et al. v. Whitney et al.*, 4 Mason, 206, decided in 1826, upon the first circuit, the assignment was made in Massachusetts, and contained a condition of release, the suit was by a dissenting and attaching creditor, and the effect of the condition upon the validity of the instrument was thus directly presented. Judge Story by an exhaustive and unanswerable analysis of the principle, held that under a correct application of the statute the provision would avoid the assignment at the instance of a dissenting creditor, and that, uncontrolled by local considerations, and in the absence of general precedents, he should so apply it; but he sustained the instrument on the grounds of an equilibrium on the subject in the Massachusetts cases, of local usage and such precedents; so far as the decision was governed by the idea of usage, it recognized what he insisted upon as the correct interpretation of the statute, but a slight sounding will show that neither ground justified his departure from that interpretation.

As to the first ground, he refers to five cases, as showing that the question was in equilibrium in that state; of two of which he remarks in effect that the point was presented in them, but not raised or passed upon, and of the other

Opinion of the Court—Peck, J.

three that they contained "*intimations, which might well lead one to doubt if the court was prepared to admit the validity of such a stipulation:*" so that according to his own statement there had been no expression by the supreme court of the state for, but strong expressions by it against the stipulation, and therefore the cases in that state were not only not in equilibrium, but accorded with his own view of the principle.

As to the second ground, a local usage, to be capable of modifying the common law in a state, must so unmistakably exist, as to require no proof under an issue of fact, but must prove itself—that is, must enable the courts of the state to take notice of it without proof; and it would seem necessarily to follow that it must be recognized, as such a usage, in the highest court of that state, before it can be recognized in any other court; this would seem to be a necessary result of the principle that the *lex loci* binds all other courts, the Federal as well; otherwise inevitable confusion would arise, and such other courts would be administering, as the law of a given place, a law not existing there; and this consideration is amply illustrated in the present instance, for one of the three cases, *Harris et al. v. Sumner*, 2 Pick., 129, mentioned by Judge Story as intimating strongly against the stipulation, was decided within three years prior to the decision of *Halsey et al. v. Whitney et al.*, showing that as late as that time the supreme court of the state knew of no such usage; and in *Bordin et al. v. Sumner*, 4 Pick., 165, the case of an assignment with a like stipulation, decided in October, 1826—though the remark, attributed by Judge Ware in *The Watchman*, at page 242 of Ware's Rep. to the court in the 4 Pick., as a declaration by that court that the question as to a stipulation for a release was reserved by it as unsettled, was not made by that court, and the real remark presented an entirely different consideration—that court (in 4 Pick.) did with unmistakable clearness hold that the question was unsettled in the state, and that it did not intend to deter

Opinion of the Court—Peck, J.

mine it in that case, and thereupon assumed to decide the case upon another ground—and thus the United States circuit court, in the 4 of Mason, was recognizing, as a part of the *lex loci* of Massachusetts, the existence of a custom which the highest court in the state was then ignoring; these facts would seem sufficiently to indicate precipitancy on the part of the Federal court in placing its judgment upon the prevalence of usage; and if it be true, as stated by Judge Ware in *The Watchman*, the case of *Halsey et al. v. Whitney et al.*, was known to the profession, before that of *Bordin et al. v. Sumner* was decided, the latter case is an announcement of especial significance by the supreme courts of the state, that it was not yet prepared to accept the alleged usage, on which the 4 of Mason was based.

As to the third ground, on which Judge Story decided, the general precedents were *Rex v. Watson et al.*, and the case of *Lippincott et al. v. Barker*, 2 Binney, 174, decided in 1809; as to the latter, the assignment required a release within four months, was attached by a dissenting creditor, and thus presented the point directly; the court was composed of three judges, and the instrument was sustained, Mr. Justice Breckenridge dissenting; Silghman, C. J., who gave a majority opinion, remarking, "I beg, however, to be distinctly understood that my opinion is confined to the circumstances of the *present case*, for there are *many and strong objections* to deeds of assignment, made without the privity of creditors, and excluding all, who do not execute releases," and Yates, J., who gave the other majority opinion, remarking in reply to the argument that the condition was coercive, "I regret that we find such few instances, of refined virtue in the payment of debts"; neither of the two precedents was authoritative to Judge Story, upon his own exposition of the statute, and statements of the views of the supreme court of Massachusetts; admiring the common law, as he did as a jurist, and bound by it, as he was as a judge, it is incomprehensible that he should have been influenced by the cases in the 3d of Price and 2nd of Bin-

Opinion of the Court—Peck, J.

ney, and to be regretted that he should have yielded his better judgment to the very superficial considerations that were allowed to govern it. *The Watchman* was the case of an assignment, which required a release, and was attached by a dissenting creditor, and held by Judge Ware, in 1832, to be void, he adopting as his rule the interpretation which Judge Story had attributed to the statute, as the correct one. In his opinion Judge Ware says that *Brad v. Viles et al.*, 2 Pet., 677, was the case of an assignment, impeached on grounds of fraud, one of which was that it required a release, that the decision was on a different point, *but that the court avoided the question, as one of doubt and difficulty*; we have no access to the case, as originally reported by Peters, and therefore do not know whether it justified the remark; but according to the case, as reported in Curtis' edition, vol. 8, at page 252, the decision simply followed the local construction of a local statute, and involved no question of fraud (and so far Judge Ware is correct), and, in confining the decision, Judge Story, who rendered the opinion, remarks: "this consideration saves us from the necessity of discussing many of the questions which have been so elaborately argued at the bar. If we were called upon to decide them from general principles, applicable to conveyances, which are assailed as being in fraud of creditors, we should have much difficulty in arriving at a conclusion upon some of the points, and should require further time for deliberation"; this is the only passage in the opinion, that relates to the subject of Judge Ware's remark, and did not justify it in the least.

• In *Marsh & Compton v. Bennett et al.*, 5 McLean, 117, decided in 1846 in the district court of Michigan, the assignment created two classes of creditors absolutely, and further provided that, should any creditor sue upon his claim, it should pass into a third class, and that nothing should be paid upon that class, until the two prior classes had been paid in full; that no part of such costs, as he should reserve, should be paid, and of the debt claim only

Opinion of the Court—Peck, J.

the amount due at the making of the assignment; the suit was in the form of a creditor's bill by dissenting creditors, and the instrument was adjudged void. In 1833 in *Brash-ear v. West et al.*, 7 Pet., 608, the court sustained a like assignment, but only upon the ground that it was made in, and therefore to be construed by the law of Pennsylvania, which then allowed the condition for a release. Judge Marshall in the opinion said: "If this release were voluntary, it would be unexceptionable. But it is induced by the necessity arising from being postponed to all those creditors, who shall accept the terms by giving the release. It is not therefore voluntary." "The objection is certainly powerful, that its tendency is to delay creditors." "The weight of the argument is felt." "We are far from being satisfied, that upon general principles such a deed ought to be sustained." These remarks meant, and could only mean that at the common law or under the 13 of Elizabeth the instrument would be void; they are to us the highest authority short of a decision, as a statement that the entire court held that on general principle, that is, ungoverned by local law, the assignment would be void. Thus the Federal courts have with uniformity declared that the common law condemns an assignment that requires a release from the creditor upon a partial payment. Had we been in any doubt upon the subject before argument, which we were not, our duty would be to treat with respect such a concurrence of views in those courts, especially such unanimity in the supreme court of the United States; though we do not mean to say that its views would govern us, except in the form of decision, or that the adjudications of the other courts of the United States rule us. Chancellor Kent, at page 534 of the second volume of his *Commentaries* says: "If the condition of the assignment be, that the share, which would otherwise belong to the creditor who should come in, and accede to the terms, and release, should on his refusal or default be paid to the debtor, or placed at his disposal by the trustees, it is deemed to be oppressive and

fraudulent, and destroys the validity of the assignment, at least against the dissenting creditors. “Mr. Burrill, having in the 13th chapter of his work on assignments, second edition, treated, at great length, of the release clause, in the 18th chapter summarizes the elements, which should appear upon the face of the instrument, to make it good at common law, into eight propositions; among which are the three following: “It must be for the benefit of the creditors, and not in any sense for that of the assignor, except as a necessary result, after all the creditors are satisfied; and to this primary object the property assigned should be faithfully and unreservedly appropriated, without any contrivance to embarrass or defeat its accomplishment. For this purpose—

“It must divest him of all title to the property conveyed, without reserving any portion for his own use, or any future benefit in the portion assigned, except in the shape of an ultimate residue or surplus, after all the debts are paid.

“It must be absolute and unconditional, imposing no coercive terms upon creditors for the advantage of the assignor, as the condition of receiving its benefits.”

Treating these propositions as sound, an assignment which reserves any of its assets to the debtor, before full payment of creditors, vitiates the instrument, whether the reservation be provided for by coercive terms or not; an assignment which contains coercive terms, whether their aim is to provide a reservation or not, vitiates the instrument, *a fortiori*, if they do aim at a reservation.

Each party contends that the courts of the majority of the states agree with its view of the question.

We believe that that majority, and are confident that the greater portion of those of the state courts, whose decisions are deserving of the most respect, hold that the release clause vitiates the assignment; but, regarding the question of preponderance as entirely subordinate, we do not enter into a critical examination, to see what the fact is; we treat a consent of the states, or the striking of a numerical balance

Opinion of the Court—Peck, J.

upon their decision as inconclusive and insensible. Upon another occasion we have said that the decisions of the state courts of this country can be considered by us as illustrative, not as determinative of the common law—akin to that we adopt, as a necessary proposition, the further rule that, when authoritative adjudications differ, elementary principles must determine,—and not the less, if the adjudications are advisory. Judge Ware thus stated it in, and by it decided the case of *The Watchman*,—“*if the authorities leave the question in suspense, the elements of a decision must be drawn from the general and acknowledged principles of law, as applied to the provisions of the assignment.*” It is an axiomatic principle, acknowledged, as we believe, in every court sitting at common law, the application alone of which has led to difference of opinion,—a principle which we cannot conceive that any intelligent authority, either case or commentary, would question,—that the debtor cannot prefer himself to the creditor in respect to the assets, and a provision which tends to secure, is a provision which does not secure that preference; upon either of the three interpretations, above defined, which may be put upon the present dividend clause, the direct tendency or effect of the clause is to secure a return to the assignor of more or less of the present assets, before the creditors have been paid; were we unaided by the views of the Federal courts—were those courts silent upon the subject, we would be compelled to declare, and we declare this assignment void.

The appellees contend that, if the instrument exhibits on its face constructive fraud, that feature is overcome by proof that there was no fraud in fact. But the one description of fraud does not imply the mere existence of the other; the instrument is plenary and conclusive evidence of fraud in law, and estops its parties from alleging good faith in fact against its import; and fraud in law is as fatal as is fraud in fact.

Our objection to the instrument proceeds wholly upon the ground of fraud by construction of law; and it is due

to the appellees and to their counsel to say that the only defect which we discover in it, is in the condition for a release; and that such a condition is sanctioned by numerous, though our duty requires us to say unsound precedents.

The appellees contend that, if the instrument must stand as affected by constructive fraud, equity will sever the elements of fraud from the text, and give effect to the rest, the same as if that element had not been in it; so that in this case the court will treat the present condition of release as a nullity, enforce the residue of the dividend clause, as it would if originally free from the condition, and distribute the assets equally among creditors, the assenting and dissenting alike.

But equity has no power to reconstruct a trust created by contract, and substitute its will for that of the parties. That would be for the court to impose its contract upon the parties, as thus it must enforce the trust, as it finds it, or hold it to be void; sustain or vacate it *in toto*. The rule at law and in equity is to treat the assignment, if fraudulent, as void *in toto*; acting upon the same principle, the two jurisdictions differ only in their method.

A different principle would more than violate the rule, that the court cannot make contracts for parties; it would flatly conflict with the statute of Elizabeth, and encourage insolvents to experiment in the chances of fraud.

Each Orator has obtained a judgment, and no question arises as to whether he must have so liquidated his original claim, before resorting to equity for relief against the assignment. But it must appear that he has no remedy at law for the collection of his judgment, before equity will assist him to collect it from the assigned fund. Upon the two earlier judgments executions were duly issued, and duly returned, "no property found," so that as to them it is apparent that there is no remedy at law; had the executions not been issued, the fact that, before those two judgments were rendered, the debtor's entire assets had passed under the assignment into the possession and control of the

Opinion of the Court—Peck, J.

assignees, and have since been retained by them under the claim of paramount title, as so derived, would have made it as apparent that there was no remedy at law, as it was made by the return of unsatisfied executions; it is therefore apparent that there is no remedy at law on the third judgment.

The learned counsel for the appellees urged upon us with much emphasis, that, to sustain the appeal, and pay the Orators in full out of the fund, leaving to the assenting creditors, who constitute the mass of the creditors in number and amount, the small remaining dividend, would be an "*outrage*." The latter creditors, by uniting in the assignment, waived their exemption from it, and conferred that preference upon the Orators. To deprive them of that rightful preference, would be an arbitrary proceeding, to which the extreme language of the counsel might properly apply. We reverse the decree of the district court.

The assignees have fraudulently withheld the assets of Wanless from the Orators, and to an amount, allowing the assignees their claim for deductions, exceeding the demands of the Orators, and have thus charged themselves with those demands. That claim for deductions is not treated by us as necessarily allowable against dissenting and diligent creditors. The assignees under a fraudulent assignment can be allowed nothing for services; and for expenses only what is reasonable; a different principle would encourage such assignments. We speak of the net fraud, admitted by them as sufficient to charge them with the demands of the Orators, simply because it thus renders an inquiry into the justice of the claim for expenses, unnecessary. A decree should be entered, decreeing to each Orator the amount of his judgment, with interest to August 15, 1879, and to the Orators a single bill of costs below and above against the three defendants; and that within thirty days from that date the defendants pay the amount, so decreed, to the Orators, and interest thereon from that date, to the clerk of the second district court in satisfaction of this de

Syllabus.

cree, and that that clerk pay the same over to the Orators, their attorneys or solicitors, according to the respective rights of the Orators.

Decree reversed.

THE UNION PACIFIC RAILROAD COMPANY v. THE
UNITED STATES OF AMERICA.

COMMON CARRIER'S LIEN.—The property of the Government is not exempt from a common carrier's lien for freight. There is no exception to the general rule in favor of the United States or any other government or sovereignty; the exemption would incalculably cripple the public service, the liability would equally promote it; no consideration of justice or policy favors, every consideration of justice and policy forbids the exemption; the liability enlarges, the exemption narrows sovereign action; the liability, not the exemption, is a privilege, and therefore an attribute of sovereignty.

JURISDICTION.—When the United States voluntarily comes into court invoking the action of the law in its behalf, it submits itself to the jurisdiction of the court and stands thereafter upon the same footing; and its rights must be determined by the same principles as if it were a private suitor.

UNDERTAKING IN REPLEVIN.—In replevin, at the common law, a judgment could only be for a return of the property, but by the statutes of this territory, an undertaking is given as a substitute for the property, and is to be charged with the judgment.

COSTS.—At common law, when the government is a party, an adverse judgment would not embrace costs; but when the government institutes the suit and furnishes the requisite security, electing to provide a fund for the costs, and to accept an adverse judgment charging that fund, the costs will be embraced in the judgment.

ERROR to the District Court of Carbon County.

This was an action of replevin instituted in the district court, of the second judicial district of the Territory of Wyoming, within and for the county of Carbon, by the United States of America, then plaintiff, to recover from the

Statement of Facts.

Union Pacific Railroad Company, then defendant, a lot of Indian supplies which had been transported by the defendant as a common carrier, and upon which the defendant claimed a right of lien for its services. The action was commenced by filing a petition on behalf of the plaintiff, in the words and figures following, to wit:

TERRITORY OF WYOMING, }
COUNTY OF CARBON. } ss.

In the District Court of the Second Judicial District.

The United States of America, Plaintiff,
v.
The Union Pacific Railroad Company, Defendant. }

PETITION.

The United States of America, plaintiff, complains of the Union Pacific Railroad Company, a corporation organized and acting under the laws of the United States of America, defendant, for that the said plaintiffs are owners of the following described goods and chattels, to wit:—3 cases, 6 bales of dry goods, 4 cases of shirts, 3 cases, 3 packages of hardware, 1 case of hats, 669 awls in cases, 1 case of tin cups, 4 cases of hatchets, 505 handkerchiefs, 1 case coats, 1 case ax handles, 9 boxes camp kettles, 9 bales, 2 cases blankets, 2 cases clothing, 2 cases hats, 3 packages drugs, and is entitled to the immediate possession of the same, and that the said defendant wrongfully and unjustly retains in his possession the said goods and chattels and from the said plaintiff. And said plaintiffs further aver that defendant did so wrongfully detain the possession of said goods and chattels for the space of sixty days next before the commencement of this suit, and wholly deprive the said plaintiff of all use and benefit thereof during all said time, to the damage of said plaintiffs in the sum of five hundred dollars. Wherefore plaintiffs pray an order against the said defendant, that he may be ordered to deliver to said plaintiff the said goods and chattels, and also a judgment against the said defendant for the said sum of five

Statement of Facts.

hundred dollars, their damages sustained by reason of the unlawful detention thereof.

EDWARD P. JOHNSON,
Attorney for Plaintiffs.

And thereafter the defendant filed its answer in the same cause, which was in the words and figures following to-wit:

TERRITORY OF WYOMING, {
COUNTY OF CARBON. } ss.

In the District Court of the Second Judicial District.

The United States of America, Plaintiff,
v.
The Union Pacific Railroad Company, Defendant. }

ANSWER.

Now comes the said defendant, the Union Pacific Railroad Company, and for answer to the petition of the said the United States of America, says:

First—That it denies each and every of the allegations stated and contained in the said petition, except that the said defendant is a corporation as therein alleged.

And of this the said defendant, puts itself upon the country.

Second—And the said defendant, for a further answer to the petition of said plaintiff, says:

That it is a common carrier of goods and merchandise, for hire and reward, from the city of Omaha, in the state of Nebraska, to the town of Rawlins, in the territory of Wyoming, that as such common carrier it received the said goods and chattels in the plaintiffs' petition mentioned, long prior to the commencement of the action herein, at Omaha, aforesaid, from one Dwight J. McCann, who was then lawfully in the possession and control of the said goods and chattels, for transportation to Rawlins, in the territory

Statement of Facts.

of Wyoming, and that thereafter as a common carrier, the said defendant carried and transported the said goods and chattels from said Omaha to said Rawlins, that under and by virtue of the contract under which the said goods and merchandise were carried and transported, the said defendant was to have the right to retain the possession of the said goods, chattels and merchandise, and of each and every part thereof, until its charges for the carriage, transportation and storage of the same should be fully paid and discharged.

And the defendant says: That its charges for the carriage, transportation and storage of said goods, wares and merchandise, nor any part thereof, has ever been paid, that its charges as aforesaid on the 20th day of November, A. D. 1877, amounted to the sum of five hundred and eighty-eight dollars and sixteen cents, to-wit: For freight and transportation, four hundred and ninety-six dollars and eighty-six cents, and ninety-one dollars and thirty cents, for storage, and the said defendant, further says: That on the 20th day of November, A. D. 1877, under and by virtue of the contract aforesaid, and under its lien as a common carrier, it had a special ownership in the said property, goods, wares and merchandise in the plaintiffs' petition mentioned, and in each and every part thereof, and on said day was entitled to the possession of the said property, and of each and every part thereof.

Wherefore the said defendant says: That the said plaintiff wrongfully and unlawfully deprived the said defendant of the possession of the property in the plaintiff's petition mentioned, to the damage of the said defendant, in the sum of five hundred and eighty-eight dollars and sixteen cents.

And the said defendant prays judgment against said plaintiff, for the said sum of five hundred and eighty-eight dollars and sixteen cents, with interest thereon since the 20th day of November, A. D. 1877, and costs of this action.

W. R. STEELE,

Attorney for Defendant.

Agreed Statement of Facts.

And thereafter the cause was submitted to the court below, upon an agreed statement of facts, which was in the words and figures following, to-wit:

TERRITORY OF WYOMING, }
COUNTY OF CARBON, } 88.

In the District Court of the Second Judicial District.

The United States of America, Plaintiff,
v.
The Union Pacific Railroad Company, Defendant.

STIPULATION AND AGREED STATEMENT OF FACTS.

It is hereby stipulated and agreed by and between the said The United States of America, plaintiff, by E. P. Johnson, its attorney, and the Union Pacific Railroad Company, defendant, by W. R. Steele, its attorney, that the facts in this case, are as follows:

The goods replevined in this action are the property of the United States, furnished for the Indian service.

That one Dwight J. McCann had a contract with the United States, for the transportation of the goods replevined and of other goods, from the city of New York, and other points, to the White River Indian Agency, in Colorado, that as such contractor the possession of said goods was delivered to said Dwight J. McCann, who was lawfully in possession of the same, being the goods replevined.

That said Dwight J. McCann, made a contract with the defendant, The Union Pacific Railroad Company, to transport and carry the goods replevined in this action and other goods, from Omaha, in the state of Nebraska, to Rawlins, in the Territory of Wyoming.

That the defendant carried the goods replevined, as a common carrier, from said Omaha, to said Rawlins, for which its proper charges was the sum of five hundred and ninety-six dollars and eighty-six cents.

That the goods replevined were stored in the warehouse

Agreed Statement of Facts.

of the defendant, at Rawlins, Wyoming, for a long period of time, for which the proper charges of the defendant for storage, was the sum of ninety-one dollars and thirty cents.

That on the 20th day of November, A. D. 1877, the proper charges of the defendant, for the transportation and storage of the goods replevined in this action, was the sum of five hundred and eighty-eight dollars and sixteen cents.

That no part of said charges have ever been paid, either by the said Dwight J. McCann, or the plaintiff, the United States of America, and no tender of the sum so due, or any part thereof, was ever made to the defendant, before the commencement of the action herein, and the taking of the said goods from the possession of the defendant on replevin.

That the goods of the plaintiff previously carried by the defendant, under said contract with said McCann, had always been held by it until its charges thereupon had been paid by said McCann.

That the appraised value of the property taken on replevin in this action, is the sum of four thousand nine hundred and fifty-one dollars.

That the defendant claimed the right of lien as a common carrier, upon the goods replevined, and the right to hold the possession of the same, until its charges for the transportation and storage of said goods replevined should be paid.

That the United States refused to pay defendant its said charges or any part thereof.

It is agreed, that had the goods replévinéd been the property of said Dwight J. McCann, the defendant would have had a lien thereon for its said charges for freight and storage, and a right to hold possession of said goods until its said charges were paid.

The question submitted to the court is:

The property replevined being the property of the United States, is and was the defendant entitled to a lien upon said property, for its charges, and had it a right to hold possession of the same until its charges were paid?

Findings and Opinion of the Court below.

If the court shall find upon the facts, that the defendant had and was entitled to a lien, and was entitled to the possession of the goods, at the time they were replevined, and that the court has authority to render judgment herein against the plaintiff, then judgment should be in favor of defendant, and against the plaintiff, and sureties, for the said sum of five hundred and eighty-eight dollars and sixteen cents, and interest.

Should the court upon the facts, find that the defendant was not entitled to such lien, and could not hold possession of said property replevined until its charges were paid, then judgment should be in favor of the plaintiff, and against the defendant.

The parties expressly waive their right to trial by jury, and agree to try this cause to the court.

E. P. JOHNSON,

Attorney for Plaintiff.

The Union Pacific Railroad Company,

By W. R. STEELE,

Its Attorney.

RAWLINS, WYOMING. }

September, 9th, 1878. }

And thereafter the court below, filed its findings and opinion, which was in the words and figures following, to wit:

The United States of America,

v.

The Union Pacific Railroad Company. }

In the Second
Judicial District.

The trial of this cause has been submitted by the parties to the action, to the court, upon agreed statement of facts.

The question presented and upon which the decision of the court is invoked is, whether the property replevined being the property of the United States, is and was the

Findings and Opinion of the Court below.

defendant entitled to a lien upon said property, for its charges, and a right to hold possession of the same until its charges were paid. Should the court decide this question in the affirmative, then the court is asked to decide the question whether it has the authority to render judgment herein against the plaintiff. This being an action of replevin, two things must be shown to entitle the plaintiff to recover:

First—That it was the owner of the goods in question or had a special ownership therein, and that it was entitled to the immediate possession of the property at the time the goods were replevined.

Second—That the property was wrongfully detained by the defendant.

Inasmuch as it is agreed that the property in controversy was the property of the United States, that question I will regard as settled. It is also admitted that the plaintiff did not undertake itself through its agents, to transport its goods to the White River Agency, in Colorado, but entered into a contract with a stranger, one D. J. McCann, to deliver said goods at the place above mentioned; this is all that is disclosed as to the provisions of said contract, except that McCann was lawfully put into possession of said goods for the purpose aforesaid.

Before proceeding to discuss the point of law involved in the case, I wish to say, that it would seem from the form of the question propounded to the court, in the agreed statement of facts, that the parties to the action desired to submit to the court, the abstract question, whether in any case a common carrier can have a lien on the goods of the United States.

Had the words, now under the foregoing statement of facts, immediately preceded the question propounded to the court, no such inference as suggested above could have legitimately been drawn or inferred. However, in considering the point submitted to the court, I have taken the most reasonable view of the matter, as to the intention of the

Findings and Opinion of the Court below.

parties, and have regarded the question, not as an abstract one, but to be decided and determined in any view of the agreed statement of facts.

The counsel for the plaintiff rests his case solely on the proposition, that the ordinary lien of a common carrier does not attach to goods the property of the United States, and therefore, inasmuch as the property replevined in this case was the property of the United States, no lien of the defendant attached or could attach, whereby the defendant as a common carrier could legally withhold the possession of the same from the plaintiff, until all charges for transportation and storage were paid.

This proposition of counsel rests upon another, namely, that exception as to the operation of liens, has always been made in regard to the goods of all governments and sovereignties, for the reason that it constitutes a known prerogative of governments and sovereignties, that if such exception did not exist, the operations of the government or sovereignty might, and probably would often be subjected to the wishes and caprices of common carriers. If this last proposition be true, it necessarily carries with it the former, and the law must be declared to be with the plaintiff, for it will be observed that the proposition contended for by counsel is broader and goes much further, than the one submitted to the court under the agreed statement of facts. If, however, it is untenable and unsound, the plaintiff's case is as worthless as a rope of sand, and consequently the law is with the defendant.

I had supposed until this case arose, that the question here involved had long been settled by repeated decisions in the highest courts of the country, and I confess my great surprise, when I learned from counsel who argued the case, that such was not the fact. It would seem as if an inscrutable Providence had so ordered it, that this question should remain an open one, in order that some country lawyer promoted to the bench, residing in some wild western territory, with little more to aid him in his herculean

Findings and Opinion of the Court below.

task than a volume of the Compiled Laws of the Territory of Wyoming, should be able to cut the gordian knot, and thereby gain immortal fame, by finding a happy and satisfactory solution of this most difficult of all questions.

Pardon this seeming digression. I will return to the consideration of the question involved in the case, viz: Is it true, that it is an acknowledged prerogative of all governments and sovereignties, to be exempt from the lien of a common carrier, or in other words, that no lien exists or can exist upon its goods for services rendered for transporting the same. In the case of the *United States v. James Wilder*, reported in Third Sumner, Massachusetts Reports, Justice Story argues this question with his usual ability, at considerable length, but declines to express a decided opinion thereon. But at the same time it is difficult to read his able opinion and to avoid the conclusion that he believed that no such exemption could be claimed, as a prerogative of any government or sovereignty whatsoever. Hear him. "The question," he says, "is whether a like lien exists in regard to goods belonging to the United States. No case has been cited in which any exception has ever been made in regard to the United States, nor has any authority been produced to show that it constitutes a known prerogative of any government or sovereignty. I have examined," continues the learned judge, "the treatises upon the prerogative of the Crown of England, and I do not find it there, or in any of the great abridgments of the law, under the title prerogative, any such exception recognized or even alluded to," and in another place the learned judge adds, "that the very reasons that the advocates of this doctrine advance to sustain their position, are the very ones that would drive me to the opposite conclusions."

I confess while reading the whole of what the learned judge said on this important question, in discussing another bearing to some extent on the one we are now considering, I felt like saying to him as Agrippa said to Paul, "Thou reasonest well."

Findings and Opinion of the Court below.

Assuming that the seeming position taken by Justice Story on this question, be correct, from what power or authority let me ask, does the exception flow? Certainly not from the constitution of the United States, for it is silent on the subject, not from the action of congress, for it has passed no law in reference thereto, nor from the organic act of the territory, for the power creating liens has not been withheld from the legislature by congress, in that instrument. The conclusions would therefore seem inevitable that there is no express law relieving the goods of the United States from the ordinary lien of a common carrier. No one, I take it, will deny, that there are times in the history of every government or sovereignty, by reason of intestine strife, rebellion or war, when all laws but that of necessity are virtually suspended, when the rights of individuals must yield to the public welfare, when even the constitution itself becomes as a piece of rubber in the hands of man, forced to expand and contract as the emergency of the hour may require. But no such state of things existed at the time the goods in controversy were replevined. Peace, with all that word implies, reigned supreme throughout the land; the Indian sat in his forest home with his cup of happiness full to overflow save the growling of an empty stomach, which this great and beneficent government of ours, had pledged its faith to him should never occur. In considering this question therefore, we have a right to take judicial notice, that the latter and not the former state of things existed.

With these observations as to the general doctrine of the prerogative of governments and sovereignties, I will without further delay consider the case at bar, as presented under the agreed statement of facts.

As I have heretofore stated, the goods in question were the property of the United States; this is admitted. It is also admitted, that the United States made a contract with D. J. McCann, to deliver the goods at the White River Indian Agency, in Colorado, and for this purpose put McCann in

Findings and Opinion of the Court below.

lawful possession of the same. McCann brought the goods as far as Omaha, in the state of Nebraska, at which point he employed the U. P. R. R. Co. to transport them to the picturesque and world-renowned city of Rawlins, in the county of Carbon, Wyoming Territory. McCann, forgetting or neglecting to pay the charges of the Company, for transporting and storing the goods, the Company held possession of the same, claiming the lien of a common carrier, to the extent of its charges. At this juncture or crisis of affairs the United States, through its then able attorney, replevined said goods, hence this suit. Now while it is true that the plaintiff's right to the immediate possession of said goods is involved in this case, yet under the agreed statement of facts, that question is finally disposed of, when the question as to the defendant's supposed lien is determined.

Independent of the agreed statement of facts, it might be contended, I take it, that the United States, having parted with its goods until they should be delivered or arrive at the Indian Agency in Colorado, could not claim that it was entitled to the immediate possession of them while in transit. But that question, and the further question, whether the defendant in an action of replevin, in order to defeat the plaintiff, can be permitted to show that a third party and not the plaintiff has the right to the immediate possession of the goods in controversy, I am not called upon for the reason aforesaid, to decide.

Returning again to the only question to be considered, I would say, that I have only been able to find one case bearing directly upon the point in issue; that is the case of *Dufolt v. Gorman*, reported in the first volume Minnesota Reports. The opinion of the court was delivered by Justice Sherburne.

This was an action brought by the plaintiff to recover a sum of money, which he alleged to be due him for hauling a quantity of goods, the property of the United States, from a place called Watah, in the territory of Minnesota, to St. Paul. It is not clear by any means that

Findings and Opinion of the Court below.

the question of lien was properly before the court or necessary for the court to decide, but the court thought it was, and decided that the plaintiff acquired no lien upon the goods to the amount of his services in transporting them. The learned judge who delivered the opinion of the court, cites no authority to support his decision on the question of lien, and had he given less reasons for his decision, he would have remained silent. He contented himself by saying, that individuals obtain no lien upon property of the government as security for their services, such a power might often subject the operations of the government to the wishes and caprice of common carriers, and dismisses that branch of the subject by adding, that it needs no argument to prove that he is correct. I am frank to admit, that this is a very convenient if not ingenious way to dispose of a troublesome question, when reasons for the ruling are almost entirely absent, and authority cannot be found to support it. Apply the iron rule laid down in this case, to all cases for the transportation of government goods, and the result is, that the rights of individuals are no more nor no less in time of peace than in war. Individual rights which should be sacredly observed and protected by the government in all cases except in the contingency I have heretofore referred to, are to be regarded as of no moment, and that too by a government professing to be a government of justice, created by the people and for the people. The bare annunciation of such a doctrine is sufficient, were it possible, to cause that section found within the lids of the Compiled Laws of this territory, and which the courts are admonished to keep constantly in view, known as substantial justice, to bid adieu to the people of this territory, and take the wings of the morning.

In order that we may see more clearly the injustice that must necessarily result from a universal application of the rule laid down in the case last referred to, let us take the case at bar. In this case the government does not attempt through its own agents to transport its goods, but contracts

Findings and Opinion of the Court below.

with a stranger to do so, one who can make no claim to honesty, but whose only ambition would seem to be, to find a resting-place within the walls of a penitentiary. Yet the government puts its goods in the possession of this man, thereby endorsing him as a man of character and of honor, his contract is his letter of credit, and with it he is enabled to secure the confidence of its citizens. Armed thus he goes forth on his mission. He makes contracts for the transportation of government's goods, and when his victims have rendered the service they agreed to perform, he neglects or refuses to pay their reasonable charges. What is the next step in this great act of injustice, if not fraud? The government is forced to dismiss its worthless contractor, and endeavors to repossess itself of its goods. The railroad company says to the government, pay us our reasonable charges and we will deliver your goods to you, your contractor having neglected and refused so to do. The government admits the service rendered and that the charges are reasonable, but declines to pay. What next? The government which has received the benefit of the services rendered, appears before a tribunal where justice is at least supposed to be administered, and asks it to become a party to a fraud, by declaring in effect that it is a known prerogative of all governments and sovereignties, to be excused for failing to be honest. I confess my sense of justice and of right revolts at such conclusions. But notwithstanding that such is the case, I feel that it is not only my duty, but that I am, at least to some extent, bound to respect and follow the decision rendered in the case of *Dufolt v. Gorman*, before referred to; with this conviction, but with a mental reservation, I must and do declare, that the law on the proposition submitted, is with the plaintiff.

And thereupon the court rendered judgment in the said cause, in favor of the plaintiff, and against the defendant. The defendant below having filed its motion to vacate the findings and judgment, and to grant the defendant a new trial, in the said cause, and the same having been denied,

prosecuted its writ of error, to reverse the judgment of the court below.

W. R. Steele, for plaintiff in error.

E. P. Johnson, for defendant in error.

PECK, J. This is a suit of replevin, brought by the Federal government against the company, for merchandise, as property owned by the former, and to the immediate possession of which it was entitled. The defendant plead the general denial; also that it held possession under a carrier's lien, when the merchandise was taken from it upon the writ of replevin. The facts were argued upon, submitting to the district court their legal effect, so that the issue was in form one of fact, in substance one of law. Its judgment was based upon this agreement: The parties stipulated that the case might be heard at chambers, and the judgment rendered as of the previous September term of 1878: and the judge who sat in the case below proceeded in form according to the stipulation. Whatever doubt might exist as to the power of parties to confer upon a district judge jurisdiction to try and decide an issue of fact in vacation, and render judgment of an expired term, is met by the fact that in this instance he was trying an issue of law—for which purpose, under the statute of December 15th, 1877, for facilitating the business of the district courts, the court was open and the September term unexpired, when the case was heard and decided; and the circumstance of rendering the decision as of a prior day during the term, is unimportant.

One Dwight J. McCann had a contract with the government, to whom the merchandise belonged, for the transportation of it from New York, or other point or points east of Omaha, to the White River Indian Agency in Colorado, where it was to be used in the Indian service; the defendant's road from Omaha to Rawlins was a proper route of

transportation for the purpose of getting the property to its destination; he contracted with the company to transport from Omaha to Rawlins accordingly; and under the contract delivered the property to the company at Omaha, and the latter duly carried it to Rawlins, and there stored it ready for delivery; and for the carrying and storage was legally entitled to be paid \$588.16, no part of which sum had been paid or tendered to it, when the writ of replevin was executed. As against McCann, had the property been his, the company would have had the usual common carrier's lien upon it for these charges. The government, claiming that its property was exempt from such a lien, refused to recognize the company's demand, and replevied the goods, the value of which, as per the replevin appraisal, was \$4,951. The transportation from Omaha to Rawlins, and the contract for it, were necessary acts on the part of McCann in the performance of his contract with the government; and nothing appears to indicate that, when the writ was executed, and up to that time, he was not in the due discharge of the latter contract; and it must be taken, if that can affect the questions to be decided, that he was then and until then in the proper discharge of his duty to the government.

In considering the questions presented by the record, we will first assume that government property is exempt from the common carriers' lien. The government can retain or waive the exemption at will. Had it transported the merchandise through an agent, the property would have remained under its control, the possession of the agent would have been its possession, the contract of carriage would have been directly between it and the carrier; and thus the exemption would have attached, and been retained. It transported the merchandise through a contractor; the contract measured the relations of the parties, and subjected them to reciprocal obligations, precisely as it would have done, had both been private individuals; imposing upon him the duty to transport, it incidentally con-

ferred upon him the right to adopt such methods, and to make such sub-contracts of carriage, as should be necessary to perform that duty—therefore to make such sub-contracts according to the established rules of carriage. The primary contract was an irrevocable authority from the government to him to that end, and to that extent—an authority upon which he, and all parties dealing with him within its scope, might rely. Receiving possession from the government, he received it upon the faith of his contract with it; contracting with the railway company, and re-delivering the property to it, the sub-contract was made, and by the company performed, upon the faith of the primary contract; all the incidents of common carriage, among them the usual lien for charges, attaching thus, the government waived its exemption, is subject to the lien, and is powerless to disturb the rights which have arisen between McCann and the company. Can anything be more incongruous than that the government should hold its contractor to his obligation, and have the right to frustrate the very methods which are indispensable to the performance of that obligation? Governments, as individuals, are held to the duty of good faith, and good faith forbids.

But the exemption does not exist. The exemption would incalculably cripple the public service, the liability would equally promote it; no consideration of justice or policy favors, every consideration of justice and policy forbids the exemption; the liability enlarges, the exemption narrows sovereign action; the liability, not the exemption, is a privilege, and therefore an attribute of sovereignty. The learned counsel for the defense in error, has submitted to us no adjudication to the contrary, which we should follow as a guide, or respect as advisory; and we are convinced that such an adjudication does not exist. On the other hand, all the analogies of the commercial and maritime law, and the Federal decisions under that law, are directly the other way. In *9 Wheat.*, 409, *St. Jago de Cuba*, it was decided in 1824 that seamen and material men, who served

and supplied the ship after her seizure as a slaver, had respectively liens upon her against the United States for wages and supplies, and that she stood pledged to them accordingly.

The case of the *United States* against *Wilder*, reported in 3 Sumner at page 308, is in point. The government shipped supplies for the public service by the schooner *Jasper*, from Boston to New York, under the terms of the common bill-of-lading, by which the goods were delivered on payment of freight; the vessel went ashore on Block Island upon her passage; expense was, consequently incurred in saving the cargo, constituting a case of general average in favor of the owners and master of the *Jasper*, who struck an average of the expense among the freighters, the government included, and refused to deliver the clothing to the latter, on its refusal to provide for its share of the average; the latter conceded that the average was correct, and that it was liable for its proportion claimed of it, but denied that its property could be retained for payment,—that is, denied that the vessel had a lien against the government for contribution. The suit was brought, and the claim thus presented to the United States circuit court for decision; and the claim of lien was sustained, the judges concurring.

In rendering the decision Judge Story said: "*The present case is not one arising under contract, but by operation of law, and, if I may so say, in invitum. It is a case of general average, where, as in a case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances the General Maritime Law enforces a contribution independent of any notion of contract, upon the ground of justice and equity, according to the maxim, qui sentet commodum sentire debet et onus, and it gives a lien in rem for the contribution.*" If this is accurate reasoning, it equally applies here; the present case may in like manner be said to arise, not by contract, but by operation of law; the freight money to be an incident to the office of the

carrier, who is a public servant, compelled to carry and to insure; and the Commercial Law, which creates the office, and defines its incidents of duty and right to enforce the payment of the freight money by a lien *in rem*.

But with unfeigned respect for that judge, we dissent from his reasoning as unsound; not as frustrating the principle on which he based the decision, but as weakening its application. The rights to general average, and to its accompanying lien exist at the Maritime Law; are abstract and dormant in the absence of a contract of shipment; by a contract of shipment become active and attach, and, in case of a loss, creating a general average, though the contract is utterly silent about them, they enure to the carrier, —and manifestly it can be only by contract. So the right to the freight money and to its accompanying lien exist at the Commercial Law; are abstract and dormant in the absence of a contract for carriage; by such contract are invoked and attach, though the contract is utterly silent respecting them; and are manifestly contract rights. But, whether the lien attaches under a principle of law, unaided by contract, or under a contract, into the substance and construction of which it enters, it is still a lien, binding the sovereign; and it none the less binds the sovereign, if imposed by contract. Thus the *United States v. Wilder*, furnishes a threefold sanction to the idea that the Federal government is subject to the carrier's lien. The case responds to the voice of justice and sound policy; it accords with the analogy of the law, and it has the *imprimatur* of two judges; as to one of whom, Mr. Justice Davis, of the district court, it may be said, that it would be difficult to find a more reliable member of the American Judiciary; and as to the other of whom, Mr. Justice Story, it may be said, that for conception, for exposition, for administration of the Commercial Law, of which Bailments are a part, he was the most accomplished jurist and judge in our language. This case was decided in 1838, and was relied upon as authority, and fully adopted by the supreme court

of the United States in the case of *The Siren*, 7 Wallace, 152, and *The Davis*, 10 Wallace, 15, decided respectively in 1868 and 1869, in one of which cases it was adjudged that the government was subject to the lien of a maritime tort, and in the other to the lien for salvage, the same as a private individual is. The books show that every description of maritime lien, whether arising by contract, tort or otherwise, other than the carrier's lien, affects the government and citizens alike; that these liens exist from the necessities of commerce, and the necessities of commerce are the necessities of the public service; it is not simply difficult to perceive, it is rationally impossible to perceive why the same rule should not apply to the carrier's lien. In the course of his opinion in 3 Sumn., Judge Story said: "That in all cases of contract made by the United States, exemption from the ordinary lien attached thereto by the maritime law, is more than I know, or am prepared to admit. Take the case of a shipment of goods, like the present, on board of a coasting vessel for transportation from one port to another, under the terms of a common bill-of-lading, by which the goods are deliverable to the consignee, or his assignees, he or they paying freight. I must say that I am not prepared to declare that the ordinary lien for freight does not attach in such a case, upon the very footing of the terms of the contract, as it would upon a shipment by a private person." The point which was the subject of this remark, was not before the judge for decision, and was not decided; but the opinion, as an opinion, is strong authority because of its author, and is directly in point, for that case, and the present one, are precisely alike in the matter of a freight lien; the fact that in that case the bill of lading required the freight to be paid before delivery, and the fact that in this one there is no evidence that the condition was expressly reserved by the company, constituting an immaterial difference, inasmuch as the reservation is only what the law implies in its absence. In disposing of this subject, we consider that the entire transaction

from the making of the original contract to the reception of the property took place in a state of peace. Whether a state of war would constitute an exception, is a matter which we are not required to, and do not determine.

The counsel for the government claims that the district court could render a judgment for, but not against it; we have listened with attention and respect to his argument, advanced in favor of this proposition; and candor requires us to admit that he has presented it as well as it could be presented; but candor also compels us to say that the proposition is throughout and throughout a fallacy. To what consequence does the proposition lead? The United States may invoke the jurisdiction of the court; it may accept that which does, and discard that which does not accord with its supposed interests; it may dictate the exercise of the administration of the law; it is not bound by the rules of equal justice; it is a privileged suitor; the district court having rendered a judgment against it, this court must reverse; having rendered one for it, this court can only affirm; it can sit in appeal, must mechanically obey, cannot revise; nay, further,—having brought the suit, and effected a caption, its aim is accomplished; it needs no judgment, for but one judgment can be rendered in the case, and that in its favor; if having made the caption, it neglects to prosecute the writ; a motion to dismiss for want of prosecution will be unavailing; still further, the demand in the writ for judgment is meaningless, the undertaking of the sureties without force, the writ is superfluous; and the suit is farcical, because it is intended to effectuate under the forms of law what can as well be accomplished by the violent hand under an irresponsible will. Does not the proposition result in a pure *reductio ad absurdum*? The Federal government cannot at common law be drawn into court. This is a sovereign prerogative, intended to protect it not only from rapacious litigation, but from just judgments as well, because the latter could be employed to disturb its due

control of its property. On the same ground suit cannot be instituted against the property of the government, if the bringing or institution of the suit requires the issuance of process against the government, or the disturbance of its possession of its property. The exemption is personal, and the will to retain is a will to waive it, in the exercise of sovereign interests. When it does waive the privilege invoking the jurisdiction of the court, it submits to that jurisdiction; presenting a claim for its adjudication, it asks that the claim be adjudicated upon its merits—and allowed or rejected accordingly. But the waiver is held to be limited, so as to guard the government against personal judgments. Within this limitation of the waiver, judgments may be obtained against it. If it sues, it is subject to the defense of offset up to the amount of whatever claim it shall establish,—a defense which does not controvert the claim, but is in the nature of a limited or quasi cross-suit against it; allowed, not to the extent of affirmative remedy beyond, but only to the extent of defeating that claim. 7 Pet., 1, *United States v. McDaniels*; 7 Pet., 18, *United States v. Ripley*; 9 Pet., 319, *United States v. Robeson*. It is true that this right of offset is created by statute; but it is also true that the statute, in creating it, recognizes this principle of waiver. At common law, however, a suit by the government, subjects its claim to any defense founded upon a defect in the claim itself; such a defense inheres in the suit, the power to sue confers the right of defense, and invokes the full jurisdiction of the court to both sides for the purpose of disposing of it according to its merits. So far this is the present case; the defense here made is founded on defect in the plaintiff's claim. But the case goes further. It is a suit *in rem*. The supreme court of the United States applies this rule to all proceedings *in rem* instituted by the Federal government, namely: That the institution of the proceeding is a waiver of its exemption from suit either against itself or its property, and opens the subject matter

of the proceeding to all opposing demands, standing towards defendants and claimants precisely like a private suitor, except as to costs and affirmative relief beyond the thing in controversy; the theory of which rule is that the government asks for, and can obtain, only what belongs to it out of the property. Upon this rule, that court disposed of the cases of *The St. Jago de Cuba*, *United States v. Wilder*, *The Siren*, and *Davis*, each of which was a proceeding *in rem* instituted by the United States, and in each of which an adversory lien was allowed; the case of the *United States v. Wilder* was commenced in trover but converted into a suit of detinue by a stipulation that, if the government was exempt from the lien in question, "*the defendant should be defaulted, and the clothing immediately given up;*" and in the case of *The Davis*, one Douglas libelled her cargo for salvage and the government intervened as owner, denying the claim, and becoming thus an actor in the controversy. According to this rule, the present suit being a proceeding *in rem*, the right of the United States is subject to the lien of the Union Pacific Railroad Co.; were the suit regulated by the common law, the judgment would be for a return of the property—exact restoration; but it is regulated by the statute, which, at sections 175 and 180 of the Civil Code, provides for an undertaking with surety to the defendant in at least double the amount of the property, conditioned, that the plaintiff shall duly prosecute the action, and pay all costs and damages that shall be accorded against him; which undertaking need not be signed by the principal, but must be taken before the property is delivered to the plaintiff, and provides that, the property having been delivered to the plaintiff, when the jury shall find for the defendant, they shall also find whether he had the right of property, or only of its possession at the commencement of the suit, and finding either for him, shall assess his damages, including his attorney's fees, for which and costs of suit, judgment shall be rendered in his favor against the plaintiff and his sureties. Thus the undertaking is a substitute for the property, and is to be charged with the judgment.

Under the distinction above explained, and by which the record would be construed, a judgment for the defendant, in suit of replevin, brought upon this statute, would, were the plaintiff a private person, be a general and personal judgment, also a judgment specifically against the undertaking; but, the plaintiff being the government, it would be a judgment only against the undertaking, and though we direct such a judgment to be in form entered, we do not mean to say that it would not suffice to limit it in form to one against the surety, for whatever its form, whether entered against the government and surety, or against the latter only, it would in effect be a judgment against the surety alone. At the common law the judgment would not embrace costs, but the government, by instituting the suit, and furnishing the requisite security, elected to provide a fund for the costs, and to accept an adverse judgment charging that fund with the costs; it is therefore consistent to embrace the costs in the judgment. In the territorial practice an attorney is what the common law intends by the two capacities of attorney and counsellor; the term attorney fees, in section 180, means the reasonable fees earned in the district court, in the performance of attorney and counsel services on the defense. At the common law such fees could not be embraced in a judgment for the defendant, but under the statute the plaintiff is chargeable with them, as a part of the damages, for the same reason that it is chargeable with the costs. Were we to send the case to the district court, we should direct it to embrace in its judgment the attorney fees, fixed at a reasonable amount upon the principle above stated.

The Company, however, waiving those fees, judgment is rendered for it for \$588.16, and interest from November 20, 1877, as damages, and for the costs of the district court, and those of this court.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE SUPREME COURT
OF THE
TERRITORY OF WYOMING.
MARCH TERM, 1880.

JOHNS v. ADAMS BROS.

PRACTICE: RULES OF COURT: BILL OF EXCEPTIONS.—Section 4, chapter 106 of the Compiled Laws makes it the duty of the supreme court to prescribe rules of practice, and such rules, when not in conflict with the Organic Act or the laws of the Territory are given all the force of statute law. Therefore Rule 5 of this court, which provides, that, “no case will be heard in court unless a motion for a new trial shall have been made in the court below in which all matters of error and exceptions have been presented, argued and the motion overruled and exceptions taken to the overruling of said motion, all to be embraced in the bill of exceptions,” is in the very line of the court’s duty to prescribe, and was not intended to work an injury, but to point out in practice, what would be required of all who come into this court seeking to set aside decrees or judgments of the court below.

STENOGRAPHER’S NOTES.—The act of December 15, 1877, in relation to the appointment of a territorial stenographer, which provides, that a transcript of his notes shall be *prima facie* evidence of the proceedings does not mean absolute, and does not affect section 303 of the Civil Code requiring a certified and absolutely true statement of the evidence to be taken up in all proceedings in error.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion by Sener, C. J.

J. W. Kingman, for plaintiff in error.

C. N. Potter, for defendant in error.

Opinion of the Court—Sener, C. J.

SENER, C. J. This case was an action at law upon which a judgment was rendered by the first district court held in and for the county of Laramie at its May term, 1878, and is here now for consideration—not on its merits, but on a motion to dismiss—which was argued and allowed at the last regular term of this court, but afterwards, upon application of the plaintiff in error, a re-argument of the motion to dismiss was allowed, and now we are first to consider the motion of the defendants in error to dismiss, because the record as brought here shows no bill of exceptions.

The necessity of a bill of exceptions to bring a judgment into this court properly for review, in order to reverse, modify or vacate it if to this court there shall seem to have been error requiring it to do so, has been repeatedly ruled on in this court. It is only necessary to refer to the following syllabus of reported cases, 1 Wyoming, to show the nature and extent of these rulings.

After the motion for a new trial has been made and overruled by the court below and an exception taken thereto, such party must have his bill, containing all exceptions together with a motion for a new trial, signed or allowed by the presiding judge of the court below. *Murrin v. Ulman*, in 1 Wyo., 36.

If the plaintiff in error has not proceeded in accordance with the foregoing rules, it is correct practice for the defendant in error to move the court to dismiss the proceedings in error. *Id.*

In proceedings in error, the record of the court below must show that a bill of exceptions, containing the exceptions upon which the plaintiff in error relies, was duly made up and signed by the judge of said court within the time limited by statute. *Geer v. Murrin*, 37.

After a motion for a new trial has been made and overruled by the court below and an exception taken thereto, such party must have his bill containing all exceptions upon which he relies, together with the motion for a new trial, signed or allowed by the judge of the court below. *Id.*

If the plaintiff in error has not proceeded in accordance with the foregoing rules, it is the correct practice for the defendant in error, to move the court to dismiss the proceedings in error. *Id.*

These decisions were rendered nearly nine years ago, and are to be sustained as precedents because conformable to the organic law of the territory and its code, and because they are in harmony with the decision of the United States supreme court, in *Thompson v. Riggs*, 5th Wallace, wherein Judge Clifford says for the court: "Settled practice in this court is that neither the rulings of the court in admitting or rejecting evidence can be brought here in any other way than by a bill of exceptions."

But counsel, in arguing for plaintiff in error and against the motion to dismiss, maintained that rule 5 of this court, which requires a bill of exceptions, in which all exceptions, and the motion for a new trial shall be made and embraced, to be essential to proceedings here, is in conflict with the organic act of the territory, its code and subsequent session acts. To this it seems to us only necessary to say:

I. That the necessity of always applying for a new trial in the same court is to be found in the facts that the laws of the territory, civil and criminal, make provision for and point out with great exactness, all the methods of such applications, and further provide how courts which have heard cases shall re-hear them. The organic act, and the laws of the territory, all alike contemplate a resort to an appellate court only when every effort has failed in the lower court, and then the party coming into the appellate court or court in error, must come under such regulations as are provided by law, not inconsistent with the organic act of the territory, and it will presently be seen that by force of the statute law of the territory the rules of this court not inconsistent with the laws of this territory, and they are not, are given all the force of statute law. They deprive no man of his right, certainly at this late day. They only point out the course to be pursued by him while asserting

Opinion of the Court—Sener, C. J.

his rights. In doing this in a law forum, he surely must always do it according to law.

II. That every party in a lower court is required to except to every thing done there which he deems prejudicial to his rights, and to save the benefit of these exceptions and objections, including the motion for a new trial; he is required by the code and subsequent laws, as well as by rule 5 of this court, not only seasonably to except, but to preserve such exceptions and objections he must resort to a bill of exceptions in which they shall all be set forth and shown, the same to be signed and allowed by the judge conducting the trial. Rule 5, therefore, of this court, is in the very line of this court's duty to prescribe, and was not intended to work an injury, but to point out in practice, what would be required of all who came here seeking to set aside decrees or judgments of the court below.

The general laws of Wyoming, section 4, chapter 106, page 545, make it not permissive to this court to provide rules for perfecting and conducting proceedings in error and by appeal, but mandatory upon it to do so, and these rules when framed, are by the legislature given all the force of law, when not inconsistent with the organic act of the territory or its laws passed in pursuance thereof, for it is expressly declared by statute—General Laws of Wyoming, chapter 106, section 4, page 545—that when not inconsistent with the organic act and laws of the territory that they are, when *promulgated*, to be as binding as legislative enactments upon the courts and upon the parties practicing and having business therein. Language could not be fuller or of greater force in establishing the validity of these rules.

But it was further contended by counsel for plaintiff in error that rule 5 of this court, which provides that “no case will be heard in court unless a motion for a new trial shall have been made in the court below in which all matters of error and exceptions have been presented, argued, and the motion overruled, and exceptions taken to the overrulings of said motion, *all to be embraced* in the bill of

exceptions," is contrary to the laws of this territory, because by section 10 of the act of December 15, 1877, in relation to the appointment of an official stenographer, it is provided that "any transcription herein provided for shall, when by said stenographer certified correct as aforesaid and as paid for, be filed among the papers of the case, action or matter in which the same was tried or investigated, and such transcript so filed, shall *prima facie*, be deemed to be and taken as a correct statement of such testimony, proceedings or the investigation and *the record thereof*."

And because of the words "that testimony so taken shall *prima facie* be the records," &c., it is claimed that no bills of exceptions are necessary to bring cases here by writ of error, and that in such cases the stenographer's transcript shall have in this court the force of a bill of exceptions allowed and signed by a judge below.

Thus to hold, would be in effect to say, that section 303 of the General Laws of Wyoming, page 71, is repealed.

This is not done in terms, certainly, nor do we think the legislature meant to do so by implication. The two statutes were made by the legislature, and evidently were not by the legislature thought to be inconsistent with each other. Nor does this court deem them inconsistent, or does it hold the first act repealed. By the stenographer's act the testimony by him taken is *prima facie* correct; *not absolutely correct*. By section 303, page 71, of the General Laws of Wyoming, the bill of exceptions must certify the true evidence, true absolutely, not *prima facie* true, and so liable to be disproved; and this the court can do, we take it, by accepting the stenographer's evidence as *prima facie* true, just as the statute declares, but not concluding it to use that evidence so reported as absolutely true. It still retains its power on its motion to correct and certify what is true, or it can correct it on motion after notice to one or both of the parties to the suit, or it can allow the stenographer himself to correct if he has made errors, and it can do

Opinion of the Court—Blair, J.

this by consent or bringing back witnesses before it, or in any manner that will accomplish right and justice.

To give to the stenographer's notes absolute instead of mere *prima facie* verity in this court, would be to usurp one of the fundamental rights and powers of every court to say what was and what was not proved before it, when it is sought to impeach its judgments or decrees by proceedings in error or on appeal, a right that no court of last resort will ever hold to be repealed by implication, and no legislature, we think, will ever repeal in terms. Indeed, the legislature in passing this act was most careful in giving to the stenographer's transcription just what we give it, *prima facie* verity, not absolute verity. And if anything were needed to confirm us in this view the persuasive if not binding force of *Pomeroy v. The Bank of Indiana*, 9th of Wallace, would surely be sufficient. There the court held that "the judge's notes do not constitute a bill of exceptions. They are but the memoranda from which a formal bill may afterwards be drawn up, signed and sealed. Sealing being required by the Federal statute, and not by the law of this Territory."

In this case there is no bill of exceptions, and for the foregoing reasons we decline to accept the stenographer's transcription as a substitute therefor, or in lieu thereof; and, therefore, without the need of disposing of any other question raised by the motion to dismiss on the part of the defendant in error, we are of opinion to dismiss the proceedings in error, and to affirm the judgment of the court below, but without the five per cent. penalty allowed upon dilatory proceedings in error.

BLAIR, J. I quite agree with my brother, the Chief Justice, in the conclusion he has arrived at in this case; but I reason from a different stand-point.

He who searches either sacred or profane history to find more than one Job, will search in vain. From the time of the creation of man to this hour, no one, it is said, ever pos-

Opinion of the Court—Blair, J.

sessed the patience of him. In that respect he stands without a peer. As to his occupation, the first volume of Wyoming Reports is silent. Of two things I feel morally certain. The first is, that had he lived in this age of the world's history, and been honored with a seat on this bench, his fame as a man of inexhaustible patience would have been less. Second, men and women would not be so often admonished to profit by his example.

I am led to these reflections from the fact that, notwithstanding a rule of this court which has received the judicial sanction of a long list of illustrious predecessors, the wisdom of which has been so conclusively demonstrated by that able jurist, Kingman, Justice, in his opinion, delivered in the case of *Wilson v. O'Brien*, which rule in the most positive language declares that the court will not review alleged errors in the record, unless the motion for a new trial made by the court below is incorporated in a bill of exceptions duly and properly signed or allowed by the court rendering the judgment; yet strange as it may seem, we are urged if not importuned at every turn, and sometimes by those who breathed into it the breath of life, to wholly disregard it. This, so far as I am concerned, I cannot, will not do. But while I shall always be found defending it from all assaults, come from whatever quarter they may, I hope I shall be pardoned for saying, that I think that our moments of time are too precious, and life far too short, to be required at every term of this court to assign the same reasons for refusing to review cases improperly brought here. I concur.

Judgment affirmed.

PECK J., dissenting. Adams Brothers sued Johns in the district court upon a note, attaching a copy of it to the petition; he plead satisfaction by a settlement, made of mutual dealings; and the issue was tried by the court without a jury.

The official reporter reported the trial; and filed his duly

Opinion of the Court—Peck, J., dissenting.

certified transcript under the statute, entitled "An Act for the Appointment of a Territorial Stenographer, and the Preservation of Evidence," the act of December 15th, 1877, 121 of the laws of that year. The transcript is embodied in the transcript of that court; and contains the evidence, ruling upon it, and two exceptions, taken by Johns to rulings, one of which was to the admission of the note, because a true copy of it was not attached to the petition; the other, that there was no replication to the plea. The court found that there was no proof of payment; and rendered judgment for the firm. He then moved for a new trial on the grounds, severally, of error in admitting the note—a true copy of it not being attached to the petition—in admitting it as *prima facie* evidence of indebtedness to the plaintiff without proof of title in it, the firm, and in finding that there was no proof of payment; also on the ground of newly discovered evidence. The motion did not contain the last named evidence, only a statement of its existence in the belief of the moving attorney; nor the exception for want of a replication, if a motion was denied. The transcript, speaking of the finding of the court, rendition of judgment thereon, and of the denial of the motion, says:
* * * "the evidence of payment having failed,
* * * it is ordered and adjudged, as to which finding of the court in rendering said judgment, the defendant then and there excepted," again, "it is ordered and adjudged by the court that said motion be, and it is hereby overruled, to which said rulings of the court in overruling said motion, the said defendant then and there excepted." He brought the judgment here by petition for review.

The defendant in error moved to dismiss the petition on the ground, first, that the records contained no bill of exceptions; secondly, that the errors complained of were not first presented to the court below by a motion for a new trial; thirdly, that no motion for a new trial was in the record; and fourthly, that the record presented no error question for review here.

Opinion of the Court—Peck, J., dissenting.

The fourth ground of this motion depends upon the merit of the first; therefore is a bill of exceptions necessary to a review of the judgment? The act entitled, "an act to amend an act, entitled, an act to provide for the privileges of the writ of error and petition of error in certain cases," 597 of the Compiled Laws, requires, in sections 2, 3 and 4, that the writ of error in civil cases shall issue to bring up and be answered by sending up for our review, a transcript of the record of the final judgment or order of the district court, a review of which is desired; that, the answer having been made, the plaintiff in error shall file an assignment of the errors complained of; that in every case, brought by writ or petition in this court, we shall review and correct all the rulings of the district court, made during the progress of such cause therein, upon all questions, whether resting for their decision in discretion or otherwise. This court can review only what appears in the transcript, so sent up. Before its power for the purpose can be exercised, both the supposed error, and an allegation of it by formal exception must appear in the transcript. The necessity for formal exception exists as to all errors, save where the record discloses defect of jurisdiction; that defect raising an exception, and dispensing with formal allegation. The necessity exists for two reasons, the first, that it is required by the appellate practice, established when the act was passed, and which the latter shows no intention to depart from; the ground, that the other statutes, herein mentioned, aside from the Stenographer's Act, provide for formal exception, and they and the statute referred to, on page 597, are *in pari materia*. Hence it is our duty to examine whatever exception is regularly in the record; and to decide upon whatever supposed error it presents.

What then is the record which is to be transcribed to this court? And how shall a formal exception get into it? Section 397 of the Civil Code, page 84 of the Compilation declares that, "The records shall be made up from the petition, the process, return, the pleadings subsequent

Opinion of the Court—Peck, J., dissenting.

thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but, if the items of an account, or the copies of a paper attached to the proceedings are voluminous, the court may order the record to be made by abbreviating the same, or by inserting a permanent description thereof, or by omitting them entirely. Evidence must not be recorded." Section 302, page 71st, "When a decision, objected to, is entered on the record, and the grounds of objection appear on the entry, the exception may be taken by the party causing to be entered at the end of the decision, that he accepts;" and section 303, same page, that, "When the decision is not entered on the record, or the grounds of the objection do not sufficiently appear in the entry, the party accepting must reduce his exception to writing, and present it to the court for its allowance. If true, it shall be the duty of the judge or court before whom the case was or is being tried, to allow and sign it, whereupon it shall be filed with the pleadings as a part of the record, but not spread at large upon the journal. If the writing is not true, the court shall correct it, or suggest the correction to be made, and it shall then be signed and allowed."

The record, defined by section 397, embraces exceptions that are preserved under 302 and 303. These two sections intended only to put the record of the district court, in respect to exception, into condition for review here; but are wholly distinct from, and independent of each other,—each applying to a class of cases essentially different from that to which the other applies; and, when either has been complied with, and the other appellate provisions have been observed, the exception secures to the party the right to a review here of whatever error the exception presents. The first provides for only exceptions which relate to matters originating in,—have their basis in the record—and are perfected, by being in the first instance entered there; the second for only exceptions which relate to matters not originating in,—have their basis not of the record—and are

Opinion of the Court—Peck, J., dissenting.

perfected upon, and become a part of it only through a bill of exceptions.

If the act at page 597 and sections 397, 302 and 303 are the only statutory provisions for incorporating exceptions into the record, the present exceptions are not properly before us; because they could not be introduced under section 302, and were not under 303; and the stenographer's report, though mechanically in, is legally out of it. But section 10 of the Stenographer's Act declares that "Any transcription, herein provided for, shall, when by said stenographer certified correct, as aforesaid, * * * * be filed among the papers of the case, action or matter in the court in which the same was tried or investigated, and such transcript so filed, shall, *prima facie*, be deemed to be and taken as a correct statement of such testimony, proceeding or investigation, and the record thereof"—which is to say—the transcript, so certified and filed, shall be treated as presumptively correct and a record—as a true record, but subject to correction. Made record matter, it becomes a part of the entire record of the case, as completely and effectually, as does a bill, judicially certified and filed under 303; and 397 is thus extended by this act. For the purpose of a review here, and so far as it goes, the transcript is evidently intended to take the place of the bill; both to avoid the cumbersomeness of the latter and to secure an accuracy which the latter cannot accomplish. The transcript duly certified and filed, to require a bill, is not to repeat exceptions upon the record, but to impose a false condition. In the present case the exception that was taken for want of replication, and not embraced in the motion for a new trial, is regularly in the record, because introduced into it by the transcript, which is legally there.

Of the four grounds, covered by the exception to the denial of the motion, that which relates to new evidence is a nullity; because, instead of the alleged evidence being embodied in the motion, a mere statement of a belief of its existence by the moving attorney is set forth—and this does

Opinion of the Court—Peck, J., dissenting.

not comply with sections 309 and 310 of the Civil Code as to motions for new trials; those sections indicate no idea of permitting a party, who affirms a material fact, to prove it by other than technical evidence, to prove it by hearsay statement, much less by a mere expression of belief; a different rule would inevitably introduce endless instability of verdicts, findings and judgments, endless laxity of practice. As to the other three grounds, the motion was addressed to—based upon the record; and thus the pleadings, issue, evidence and rulings upon it, which were decisions, and the exceptions which covered them, became incorporated into the record in the full sense and with the full effect of section 302. All the exceptions which are stated in the transcript of the district court, as having been taken subsequent to the trial, must have been entered in the record by the clerk, and purport to have been taken and entered respectively next to the decisions to which they were taken; and therefore at the ends of them in the literal sense of 302. Therefore, the record contains exceptions, which, so far as concerns the supposed necessity of a bill, are properly before us for review; and their value could not be determined, without previously denying the motion.

If it be objected that the effect of this construction will be to carry into the record such errors as the stenographer may commit in taking, or in transcribing his notes, the ready answer is, that every part of the record, and therefore that which consists of his report, is open to correction by the court on its own motion, or that of the party at the trial term; section 10 distinctly reverses this common law power, by declaring that the report shall, as filed, be but presumptively correct; and that under the act of December 15th, 1877—32 of the laws of that year—entitled, “An act to facilitate the business of the district courts,” that term continues until the next term for the purposes of such motion by the party; and must equally continue for the purposes of a correction by the court of its own motion; because its power so to correct must impliedly be extrinsic,

Syllabus.

as is its power to correct on the motion of the party, in a matter of correction based upon its knowledge of the trial. A bill of exception was unnecessary.

The third ground, of the motion to dismiss, was denied by the record. Its record meant that the fifth rule of this court imposed a condition precedent to review here, which had not been satisfied. For my answer to this objection, I refer to my opinion, rendered in the case of *White v. Sisson, Wallace & Co.*, which was decided by this court at its March term for 1878.

The motion to dismiss should have been denied.

WILLIAM HINTON v. SAMUEL H. WINSOR AND UINTA
COAL AND MINING COMPANY.

PRACTICE: APPEAL.—Where the appellant filed a disclaimer in the district court to a bill to foreclose a mortgage, upon which no issue was joined, *Held*, that it was estopped, in the supreme court, from asserting interest, and having no interest its appeal could not give the court jurisdiction to vacate or modify the decree of the court below. And having no standing in this court to complain of the decree below, the appeal will be dismissed with costs.

APPEAL from the District Court of Uinta County.

William Hinton commenced this proceeding by filing a bill in the district court of Uinta county, March 15, 1875, to foreclose a mortgage on an undivided two-thirds of the N. $\frac{1}{2}$, of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of S. 8, P. 15, west of range 120, which mortgage was given by S. H. Winsor, owner of the property, to William Hinton, to secure the payment of \$2,145. The defendants were Samuel H. Winsor and the Uinta Coal and Mining Company, which last named defendant, it was alleged, was sup-

Opinion of the Court—Blair, J.

posed to have or claim some interest in the property, by virtue of a conveyance from Winsor subsequent to the mortgage. Winsor never appeared to contest the case. The appellant did appear to dispute the jurisdiction of the court, and, being overruled on that point, filed a disclaimer denying that it had, or ever claimed to have, any interest in the property described in the bill, and made no further appearance. A rule was taken upon the appellant to answer, and on failure to comply with the rule was adjudged in default, and the case referred to the master, who took the testimony, reported the same, and thereupon the court made the decree against Winsor for the payment of money and the sale of the property, and a subsequent report to the court for further proceedings. The only interest that the court ascertained the appellant had in the premises, was, that it was in possession, and it was ordered to give the master possession, to enable him to carry out the directions of the decree. It does not appear from the record that the decree was ever carried into effect, or the appellant in any manner disturbed, though no supersedeas bond was ever filed.

Appellee moves to dismiss the case.

H. Garbanati, for appellant.

W. W. Corlett, E. A. Thomas, and Johnson & Potter, for appellee.

BLAIR, J. This suit comes to this court on appeal. The record before us for consideration, shows that on March 15th, 1877, William Hinton, the complainant in the court below, and appellee in this court, filed his bill of complaint in the district court of Uinta county, to foreclose a certain mortgage given by Samuel H. Winsor on certain property in the bill mentioned and described; said property lying and being in the county of Uinta; said mortgage having

been given by Winsor to secure the payment of the sum of \$2,145, due from him to William Hinton.

Inasmuch as the Uinta Coal and Mining Company was supposed to have, or claim some interest in the mortgaged premises sought to be sold, to satisfy the said claim due from Winsor to Hinton, the said company was made a party defendant in the bill, and this appeal was taken in behalf of said company.

Hinton, by his solicitors, appears in this court, and moves to dismiss the appeal for the following reasons, to wit:

First, On the ground that there having been no final decree in the court below, there was nothing to appeal from.

Second, For the reason that by the disclaimer of the appellant, upon which no issue was joined, the appellants are estopped from asserting an interest now.

Third, That having no interest, the appeal gives this court no jurisdiction to vacate, alter or modify the judgment or decree of the court below.

Fourth, That the appellants have no standing in this court, to complain of the decree.

We have examined the record in this case, with a degree of patience and diligence, seldom equaled, but never excelled in the history of judicial tribunals, to find something of which the appellant might in equity complain; but all in vain. The appellant in the court below, appeared on the 12th day of January, 1878, and filed what it termed a plea to the complainant's bill, but which, as the court thinks, by every rule of equity must be regarded as an answer in the nature of a disclaimer. In its answer it solemnly avers "it has not, nor ever had, nor pretended to have, nor did it ever claim any right, title or interest whatever, in the land or any mining property of the said Samuel H. Winsor; and that the complainant had no right to institute this or any other suit against it, (the company) in respect thereof."

If that be so, and there is nothing in the record to cause the court for a moment to doubt its correctness, by what right, let us inquire, does it bring this suit here to be reviewed?

Inasmuch as no one can suffer any injury in a suit, except such person be interested in the subject matter in controversy, the appellant, at least, so far as this suit is concerned, was secure from all danger, present or remote. But for the argument of the solicitor for the appellant, the mystery that surrounded the bringing of this case for review, would have ever remained unsolved. The solicitor for the appellant revealed the fact, that the answer was only intended to disclaim any title, interest or claim to the mine in question, so far as derived through or from the said Samuel H. Winsor, of the State of Indiana, but it did claim title or possession of said mine of one said Samuel H. Winsor, who resided in Wyoming Territory at the time said mortgage was executed, and by whom it was signed. If such was the fact, why was it not so stated in the answer? It certainly was its duty to do so, and the failure in that respect closed the door against the right to demand that this court review the proceedings of the court below, for there is nothing in the record to show that the appellant had any interest in the subject matter for judicial investigation, nor does it appear that the appellant has any equitable right to complain that costs were not awarded it in the district court.

The entire costs of the suit were directed by the court to be paid out of the proceeds arising from the sale of the mortgaged mining property. It is therefore but reasonable to presume, that the appellant received its costs and its just dues.

For the foregoing reasons it is manifest, therefore, that this court is not called upon to consider the other questions sought to be raised.

The court are of opinion, that this appeal ought to be dismissed with costs.

Appeal dismissed.

PECK, J., dissenting. On the 15th day of March, 1877, Hinton commenced in the third judicial district court,

Opinion of the Court—Peck, J., dissenting.

sitting in Uinta county, a common suit of foreclosure against Samuel H. Winsor on a mortgage of real estate, situated there executed by the latter to the former; joining the company, as defendant, under an allegation that it had, or claimed to have some interest in or lien upon the property; and at the same date the company was served with the usual subpoena—which process was issued from and made returnable into that court, as sitting in that county; the cause continued in that court until 1878; from that date to its end below in a court which the transcript describes as the second judicial district court, sitting in and for the same county, the judge of the second judicial district presiding; and after 1877 consisted, among others of the following proceedings, and in the following order; an objection filed by the company, for want of jurisdiction in “that the act, redistricting the judicial districts, passed at the 1877 session of the legislature provides that all cases pending in Uinta county, shall be and remain as if said act had not been passed,” a denial of the motion, and an exception by the mover therefor—a disclaimer filed by the company, of all interest in or claim to the property; which disclaimer asked for a dismissal with costs—a motion by the orator to strike the disclaimer from the files; and a denial of the motion—a master’s report, containing proof that the company was in possession of the premises at the commencement of the suit, and had so continued since—a decree, which adjudged that a specified amount was due to the orator upon the mortgage; that it should be paid within a given time, or Winsor and all claiming under him should stand foreclosed; and in case of default, that the master should sell—apply the proceeds to the payment of the costs of sale and suit and of the orator—retain the surplus if any, for further order, and report at the next term—and that Winsor and the company should surrender possession to the master, so as to enable him fully to discharge his duty. No costs were ascertained by the decree; nor except in the above stated manner mentioned. No action was taken

Opinion of the Court—Peck, J., dissenting.

upon the disclaimer other than what is above stated or may be inferred from what is above stated. Up to 1878 the time to plead had not expired. The company seasonably filed a notice that it appealed from the decree as well as from the authority of the judge of the second judicial district to render it. The appellee moved to dismiss the appeal on the grounds, that there was no final decree of the court below, when the appeal was taken—that the disclaimer showed that the appellant had no interest in the property, which was affected by the decree—the decree not having been appealed from by the parties, who were interested in it, this court had no jurisdiction to reverse, modify or affirm it—that the appellant had no standing in this court, so as to complain of the decree; and a majority of this court have granted the motion with costs. The decree, which was rendered below, was final; and perfected the company's right of appeal for any ground of appellate relief which the case presents. When the second district court took possession of the case the company's day in court remained to it for all the purposes of meeting the bill by demurrer, answer, plea or confession: and it was its right to seek for a final decree by one of these methods—costs to be granted to, or imposed upon it, as the case might be; and necessarily this could be only in a court of jurisdiction. The territorial statute of December 10th, 1875 entitled "An act establishing the judicial districts within the territory of Wyoming and to provide for the holding of courts therein"—Comp. Laws 385—provides that Albany and Carbon counties shall compose the second, and Sweetwater and Uinta counties the third judicial district. This act remains in force as to the present case, unless it has been superseded by the statute of December 15, 1877, entitled "An act to provide for the organization of Crook and Pease counties and to provide for holding courts therein"—Laws of 1877, page 34—and which contemplated the organization of a new third district out of those counties. But the seventh section of this act declares "that all suits and proceedings,

Opinion of the Court—Peck, J., dissenting.

now pending in the courts of Uinta and Sweetwater counties shall continue and be proceeded with, as if the act had not been passed." Hence the second district court had no jurisdiction in the case, therefore all its proceedings were null, and they were powerless, except to becloud the remedial rights of the parties: the appellant was entitled to relief from this court; and its appeal was a proper method of obtaining the relief: this court should have declared the proceedings of the second district court void and null; and have reversed its decree; instructing it to abstain from further interference in the case, and to have the third district court to proceed with it according to its original and proper jurisdiction.

Again, to obtain the decree which was rendered below, the orator availed himself of the reported proofs, which tended to show that the appellant held possession of the premises under right; and the decree contains a clause which assumes to bar that right, as junior to Hinton's. This illustrates the necessity of a reversal; so that, disembarassed of the decree the appellant might vindicate that right in a court of jurisdiction; its disclaimer not operating there as an estoppel, because the orator could employ it, not as record, only as documentary evidence against its attempt to set up such right.

GARBANATI v. BECKWITH.

SUMMONS: PRESUMPTION OF SERVICE.—This court cannot presume, in any case, that a summons was duly issued and served, unless the record affirmatively shows these facts.

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

H. Garbanati, for plaintiff in error.

W. W. Corlett, for defendant in error.

BLAIR, J. It appears from the record in this case, that one Jesse Knight, a justice of the peace, in and for Uinta county, on the 7th day of June, A. D. 1878, at the instance and request of the plaintiff in error, issued a summons directed to the proper officer of said county, commanding said officer to summon A. C. Beckwith, the defendant in error, to appear at the office of said justice on the 12th day of June, A. D. 1878, to answer the action of the plaintiff in error as assignee of T. Hofer, to recover the sum of \$36.63, claimed to be due from the defendant to the plaintiff in error. It further appears that Beckwith appeared to the action and filed a general denial and also payment.

The justice rendered judgment in favor of the defendant, and against the plaintiff. And thereupon the plaintiff took an appeal to the district court with no better success, judgment being rendered against him. Not being weary in search of substantial justice, he sues out a writ of error, and brings his case to this court, where substantial justice is known to be administered in all its purity.

The facts in the case as gathered from the record, are in substance as follows: That a day or two prior to the 21st

Opinion of the Court—Blair, J.

of May, A. D. 1878, the defendant in error being indebted to one T. Hofer, gave said Hofer his check for the sum of \$50.63. That afterwards the defendant paid Hofer a part of said sum, leaving a balance on May 21st A. D. 1878, of \$36.63, due Hofer on said check. That at the time defendant paid Hofer the payment aforesaid, he retained possession of said check, and through his authorized agent executed to Hofer a paper writing to the effect, that there was due Hofer on said check the sum of \$36.63, mentioned as aforesaid.

Hofer, it appears, like the plaintiff in error in this court, had also at sometime prior to this transaction, been in pursuit of substantial justice, and in order to effectually guard against the most remote probability of his failing to obtain it, and that speedily, secured the professional services of the plaintiff in error to assist him in his laudable efforts, and to compensate him therefor, he assigned to the plaintiff in error the writing aforesaid.

Up to the hour of this transaction in this case, no cloud was visible, not even to the size of a man's hand, to foretell the coming storm. Hofer had rendered to Cæsar that which was Cæsar's, and no doubt experienced the pleasure that always flows from duty well performed.

Garbanati, too, was doubtless also anticipating, if not realizing that enjoyment which is the true reward of honest toil; but disappointment in this life seems to be the inheritance of all men. It was so in this case, as the unwelcome news was soon communicated to the plaintiff in error, that one Rattelle, claiming to be a creditor of his client Hofer, had brought suit the day prior to the assignment aforesaid, against the said Hofer, to recover a certain sum he claimed to be due him, and had summoned the defendant Beckwith as garnishee. A judgment appears to have been rendered in the justice court against Beckwith as garnishee for the amount due Hofer, and an order made that Beckwith pay the same into the justice court.

Beckwith now being between two fires which threatened

Opinion of the Court—Peck, J., dissenting.

his destruction, sought to defeat the action of the plaintiff in error by showing that he had been garnished by Rattelle, the creditor of Hofer, and that too, prior to the service of the summons of the plaintiff as assignee of Hofer. Unfortunately for the defendant in error, there is nothing in the record to show that any summons was ever issued or served on Hofer, in the suit of Rattelle against him, or that any judgment was rendered in the case.

In the absence of evidence to prove these facts, this court cannot presume that a summons was duly issued and served, and a judgment legally rendered against Hofer and in favor of Rattelle the alleged plaintiff; and more particularly when the counsel for the defendant in error, in his statement of the facts in the case, before the district court, admitted, "That the proceedings as far as the garnishment is concerned, may not have been strictly in compliance with the law."

This court is therefore of opinion that there is error in the judgment of the court below, and that the same should be reversed, and judgment be entered for the plaintiff in error, for the amount of the plaintiffs' claim with legal interest thereon. And it is so ordered.

Judgment reversed.

PECK, J., dissenting. The plaintiff sued the defendant in a justice's court in Uinta county in 1878, suffered judgment, and entered an appeal from it in the second judicial district court, as sitting in and for that county; judgment was there rendered against him, and he has brought it here for review; all the proceedings below, subsequent to the entry of the appeal, purport to have transpired in the last named court, as sitting in and for that county, a part of them as presided over by the judge of the second, the residue, as presided over by the then chief justice, the judge of the first judicial district. No objection was made below for want of jurisdiction in the second

Statement of Facts.

judicial district court to take cognizance of the case, or for want of competency in the judge of the second district to sit in it; nor has either objection been raised here by either party. Upon the principles, which I have endeavored to elucidate in the case of this plaintiff against Beckwith & Co., previously decided at this term, the judgment should have been reversed, and the case dismissed.

If the judge of the second district could not hold his court in that county, neither could another do it.

GARBANATI v. BECKWITH & Co.

DEFAULT—Where a party has been duly served with a summons he cannot complain that a judgment by default has been rendered against him, if he does not appear and defend at the proper time.

ERROR to the District Court of Uinta County.

The defendants in error on the 27th day of February 1878, commenced an action against the plaintiff in error and one A. H. Davis, by filing a petition and causing summons to be issued, which was served upon each of the defendants personally, on the 27th day of February 1878, requiring them to answer on the 30th day of March, 1878. On the 1st day of July, 1878, the plaintiff in error filed a demurrer to the jurisdiction of the court. On the same day a default was taken, and on the 5th of July judgment was rendered (on exhibition of proofs) in favor of the defendant in error. The case was brought up on writ of error for review of the record, on the following assignment of errors:

1st. That the action and proceedings were had in the county of Uinta, as of the second judicial district and before the judge of said district instead of, as of the third district and before the judge thereof as provided by law.

Opinion of the Court—Sener, C. J.

2d. That the return of the officer on the summons is defective and fails to show that service was had in said cause on this defendant in the court below.

3d. That the court erred in disregarding the demurrer of this defendant, filed in said cause.

4th. That the court erred in entering default against this plaintiff.

5th. That the court erred in rendering judgment against this plaintiff and for the defendant in error.

The defendant in error moved to affirm the judgment of the court below on the ground that the record failed to present any question for review.

H. Garbanati, for plaintiff in error.

W. W. Corlett, for defendant in error.

SENER, C. J. The court is of opinion that there is no error in this case for it to review, reverse or modify, so far as the record shows.

From an inspection of the transcript of the record it appears that the defendants in the court below, the district court held in and for the county of Uinta, H. Garbanati and A. H. Davis were served with process on the 27th day of February, 1878, the petition to begin the action being filed that day in the clerk's office of said court at the county seat of Uinta county, and process being served on said defendants in that county as the return therein shows. The defendants should have answered or demurred by the 30th of March, 1878, which was the third Saturday after the return day of the summons: this they both neglected and failed to do.

Afterwards a demurrer was filed July 1st, 1878, by one of the defendants, H. Garbanati, the other defendant not appearing.

The record does not show affirmatively that it was filed by leave of the court; if such affirmatively shown leave were necessary, of which it is not necessary for the court

here to consider, nor is it, in our view, necessary in this case to consider the right of the court, under the statutes regulating the practice as to demurrers, to grant such leave at that time, nor the presumption or lack of presumption that such leave was given.

On the same day, July 1st, as appears from the transcript of proceedings brought here, and after H. Garbanati, one of the defendants, had filed a demurrer, the defendants, Garbanati and Davis, were solemnly called three times into court and came not.

Again on the 5th of July, 1878, a trial was had in said court as by default, and a judgment rendered in favor of Beckwith & Co., the plaintiffs below, against the defendants Garbanati and Davis.

In this state of facts H. Garbanati, one of the defendants below, comes into court and seeks by proceedings in error to have the judgment of the court below reviewed, reversed or modified.

To our minds it seems that there is but one conclusion that can be reached, viz.: that the plaintiff in error here, H. Garbanati, had abandoned his demurrer in the court below, even if it ever was properly there, and that he and his co-defendant, Davis, if not consenting to a judgment there in that court against themselves, certainly, so far as this court is advised by the transcript of the record, did not oppose or object to the rendition.

They had due summons in this action and failed to make a proper defense or any defense at all, at the right time in that forum to which they were duly summoned; and in which, if they had a valid objection or defense to the action under the laws of this territory, they should have appeared seasonably and made them. And failing to do so in the court below when properly called, they, nor either of them, have any cause of complaint here which this court can or ought to consider.

Wherefore it seems to the court that the proceedings in error in this case should be dismissed, and the judgment of the court below affirmed with costs under the statute.

Opinion of the Court—Peck, J., dissenting.

Judgment affirmed.

PECK, J., dissenting.

The defendant in error moved for affirmance, "because the record presents no question for review." If the record presents a question, which this court could, it presents one which this court should have reviewed; and that fact answered the motion. It matters not what the merits of the questions are; it suffices that there was the question. Its merits would have remained for determination after the denial of the motion; because the record would speak what the motion denied: namely—the existence of the question. Granting the motion excluded, denying it admits the question. The record does present such a question; and the motion should have been denied, reserving the enquiry for hearing. The court, however, might have directed it to be heard in the first instance, and in answer to the motion; the principle would have been the same, the form different.

The defense in error put the motion on the ground that the plaintiff here, the defendant below, had there made no formal allegation of error. The prosecution in error opposed on the ground, that such allegation was unnecessary in case of patent defect of jurisdiction; and that the record prevented the enquiry whether there was not such defect, notwithstanding the statute of September 15th, 1877, entitled, "An act to provide for the organization of Crook and Pease counties, and to provide for holding courts therein."—Laws of 1877, page 34; and this proposition was correct.

As to objecting to a patent jurisdictional defect without a formal allegation of error. The record presents no allegation, as made below by the plaintiff in error, by exception or otherwise, that the lower court erred; but if it discloses an incurable defect of jurisdiction in that court, it discloses a defect that carries its exception with it, by operation of law, without formal allegation, wherever the record may go;

Opinion of the Court—Peck, J., dissenting.

the defect vitiates the proceedings that appear in the record, and deprives it of all effect, except as evidence of their nullity. Parties cannot confer—cannot waive the absence of jurisdiction. Hence jurisdiction wanting, either party, as well the one who invokes, as the one against whom it is invoked, may at any stage of the proceedings below, before or after judgment, orally or in record form, claim a dismissal on that ground; and the lower court of its own motion should decline accepting a false jurisdiction; having accepted, should dismiss on discovery of its error. Hence also, if a record thus defective, is taken to an appellate court, it is there for revision as to that defect, the same as if a formal exception for the defect had been taken below, and preserved by the party against whom the fictitious jurisdiction has been exercised; in the court above it is equally open to attack by the party who obtained, and by the party against whom was obtained the judgment below; for neither can the latter be compelled to submit to it, nor the former to accept it; and neither party raising the objection in the upper court, that court of its own motion upon inspection of the record should do what the inferior court should have done—dismiss the suit, reversing as the case may require. Want of jurisdiction is the want of all power but the single power to decline, accepting, or abandon, if accepted, false jurisdiction. There is but one exception to the principle—namely, that jurisdiction over the person may be conferred by consent, because it is founded on personal privilege; but it must be simply such jurisdiction, and therefore, when acquired must, like jurisdiction of subject matter, be exercised within the prescribed territorial limit.

This principle of the common law, which is our rule, fixed, and clear beyond intelligent doubt, inherent in the very necessities of justice, and inseparable from the safe exercise of judicial power; and every court should readily listen to objection as to jurisdiction, the more carefully to guard against the mischiefs resultant from the erroneous assumption of it. This court so decided at its

Opinion of the Court—Peck, J., dissenting.

last term, in *McLaughlin* against *Upton*, assignee in bankruptcy of the Great Western Insurance Company. The civil code of the territory very fully recognizes the principle by its sections, 78, 80, 85 and 87, at pages 44 and 45 of the Compiled Laws, that all defenses shall be presented by answer or demurrer: that the defendant may demur to the petition because the court has no jurisdiction of his person, or the subject matter of the action; but that no objection being taken by answer or demurrer, he shall be deemed to have waived objections, "exceptionally objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action."

The record shows that the plaintiff in error demurred specifically for want of jurisdiction over his person; that subsequently he was defaulted; that the court assessed damages, and entered judgment against him on the default; and that issue, raised by the demurrer, was not otherwise passed upon, than by the proceeding, which so transpired after the demurrer was interposed. It follows from the principle, now explained, that the demurrer, if well taken, was superfluous; that all the proceedings against the present plaintiff, both before and after judgment, were void; and that it was our duty, on more inspection of the record, to reverse and dismiss.

My transcript was given to this court by the clerk of the second judicial district court, under what purports to be its seal for Uinta county; and all the proceedings, recited in it, transpired in that court, which is described as the second judicial district court, sitting in and for that county, where the venue was laid, where alone the court would exercise jurisdiction upon the summons, where the present plaintiff was alone—if at all—bound to appear, where he did appear, and where all the proceedings were had. The suit was commenced on February 27th, 1878. The record does not state in terms, but presents the necessary presumption that the court was held in all the proceeding below by the Hon. Jacob B. Blair, the judge of the second district.

Opinion of the Court—Peck, J., dissenting.

The jurisdiction of a court, however extensive as to person and subject matter, is necessarily bound by territorial limits; existent within, is non-existent without those limits. If during those proceedings the second judicial district did not embrace Uinta county, they were jurisdictionally void; if it did embrace that county, they were jurisdictionally valid. By the territorial statute of December 10th, 1875, entitled, "An act establishing the judicial districts within the Territory of Wyoming, and to provide for the holding of courts therein,"—Compiled Laws, page 385—it is provided that Laramie county shall compose the first, Albany and Carbon counties the second, and Sweetwater and Uinta counties the third judicial district. So the divisions stood until December 15th, 1877, when the above stated statute of that date was passed: the purpose of which was the extension of the second district over Sweetwater and Uinta counties, and the substitution of a new for the existing third district, to consist of Crook and Pease counties. With this exception, no statute has been passed on the subject since the act of December 10, 1875. Hence, if the second district court had jurisdiction over Uinta county during the proceedings which are in question, it was conferred by the act of 1877. Whether it was or was not conferred depends upon, and involves a threefold inquiry—first, if this act contemplated that the extension of the second should commence before the organization of the new third district, could it have that effect under the Federal legislation, which allows the territorial legislature to district and re-district the territory? secondly, does it contemplate that the extension commence before the new third was organized, for, if it did not, the extension has in neither view begun, because the new third has not been organized; third, whether the act is valid, for if not, it conferred nothing. This is an inquiry into jurisdiction, patent upon the record. A fourth inquiry, though not suggested at the bar, is patent—whether, aside from the jurisdictional objection, Mr. Justice Blair was a competent

Opinion of the Court—Peck, J., dissenting.

judge to hold the court below, in view of the act of December 15th, 1877, entitled, "An act to provide compensation for Hon. J. B. Blair, associate justice of the supreme court,"—Laws of 1877, page 29. That judge has exercised jurisdiction in the name of the second judicial district court over Uinta and Sweetwater counties, embracing one-half of the territory, under the alleged authority of the act of that date, which is first above mentioned, since the 17th day of December, 1877. If the authority has not existed, that jurisdiction has been fictitious; and all acts which have been done under it, void; because no *de facto* jurisdiction can be upheld, except as the exercise of a *de jure* jurisdiction by a *de facto* officer—the *de facto* quality applying to the officer who exercises, not to the jurisdiction which is exercised. Further, if he *que judge*, has been incompetent, for this reason alone, his acts have been void.

The motion touched an inquiry of primary moment—one which this court should have been rather eager to hear than to avoid. Notwithstanding these formidable considerations, without the matter having been heard upon its merits, or considered in conference, the majority of this court has granted the motion, and affirmed the judgment. If the jurisdictional objection was sound, *a fortiori* the motion should have been denied, the appeal sustained, the judgment reversed and action dismissed. The Federal Constitution, at Art. 4, Sec. 3 and subd. 2, provides that "Congress shall have power to make all needful rules and regulations respecting the Territory of the United States." Our organic act, at sec. 4, "that the Legislative power and authority of said Territory shall be vested in the governor and legislative assembly;" at sec. 6, that the legislative power of the "Territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act;" and, at sec. 4, that all bills shall be submitted to the governor for his concurrence or objection; at sec. 9, that the Territory "shall be divided into three judicial districts, and a district court

shall be held in each of said districts by one of the judges of the supreme court at such time and place as may be provided by law, and the judges shall, after their appointment, reside in the districts which shall be assigned to them ;” and this last provision is repeated in sec. 1865, of the U. S. Rev. Stat. of 1875 ; and those statutes at sec. 1913, provide that “the legislative assembly of Wyoming may organize, alter or modify, the several judicial districts thereof, in such manner as it deems proper and convenient ;” and at sec. 1919, that, “it may fix and alter the times and places of holding courts for the territory in such manner as it deems proper and convenient ;” and the organic act at sec. 7, that “all township, district and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the Territory. The governor shall nominate, and by and with the consent of the council, appoint all officers, not herein otherwise provided for ; and in the first instance the governor alone may appoint all such officers, who shall hold their offices until the end of the first session of the legislative assembly.” The first session of that assembly was in 1869 ; and all these statutes were in operation when the act of December 15th, first mentioned, was passed. This act provided in its sec. 1, that the governor should immediately organize Crook and Pease counties, by appointing for them respectively the officers, then provided by law for the several counties of the Territory, who should qualify, and enter upon their offices, and hold them until the next general election, or until their successors should have qualified ; in its sec. 2, that Crook and Pease counties “are hereby organized into, and shall constitute the third judicial district of the Territory, and William Ware Peck, associate justice of the supreme court, is hereby assigned as judge of said district, and is authorized and required to hold the courts herein provided for, in said district ;” in its sec. 3, that Sweetwater and Uinta counties “are hereby attached

Opinion of the Court—Peck, J., dissenting.

to and made part of the second judicial district, and J. B. Blair is hereby authorized and required to hold the courts therein, as now provided by law ;” in its sec. 4, that there shall be held at the county seat of Crook county, one term of court annually, beginning on the first Monday of July, and a term at the county seat of Pease county annually, beginning on the first Monday of October ; in its sec. 5, that the county seats of each county should be located by the commissioners of the county ; in its sec. 6, that the governor might re-district the Territory and assign judges in case “of a vacancy occurring in the office of the judge of said third district, or of a change in the incumbency of the office ;” in its sec. 7, that “all suits and proceedings, now pending in the courts of Uinta and Sweetwater counties, should continue and be proceeded with, as if the act had not been passed ; and in its sec. 8, that the act should take effect from its passage.

If this statute contemplated the extension of the second before the organization of the new third district, could it have that effect under the Federal statute, which allows the Territorial Legislature to district and re-district? The provision that the Territory shall be divided into three districts, and a district court held in each by a resident judge, is imperative, at once puts upon the legislature a duty, and conditions and limits its performance ; requiring a division to be made into three districts, it requires the districts to be maintained ; requiring the court in each to be held by a resident judge, it requires the division to be made between the three judges, a district to a judge, the very clear purpose being to secure to the community, and against the caprices of legislation, the most judicious division, with reference to the wants to be supplied,—the most beneficial administration of law through the district courts by all the judges,—and, to that end, the localizing of the work, at the same time effectuating the judicial appointments ; approximate equality must, therefore, have been intended.

The power to re-district is necessarily governed by the

Opinion of the Court—Peck, J., dissenting.

same idea. It follows that the legislature could no more render one judge supernumerary, than it could two—two, than it could the three members of the supreme court; and so close the courts; the judicial appointments taking effect not by the supreme will of the Federal government, but by the supreme will of the territorial legislature. It follows that the legislature could no more reduce the territory to two districts, than to one—to one, thence to abolish the districts, and the courts; that, for a district to exist, three must exist; that one could not be destroyed, except as another was formed. It follows that this statute, if it contemplates the extension of the second, before the creation of the new third, conflicts with the Federal laws; and so far is void.

Does it intend that extension? The answer requires that it should be construed as an entire context; therefore each part relating to the rest; and in the presumption, that its purpose was subordinate to the law; and the presumption will hold, unless the statute overcomes it. Its provision that it shall take effect from its passage, does not mean that all its provisions shall operate at once; that would be impossible, and the construction absurd; but that they shall operate sequentially, according to the object—for that alone is possible, and that construction consistent. It declares as the first step to be taken, that the governor shall organize Crook and Pease counties by appointing and commissioning for them the officers, already provided by law for the several counties, which officers include county commissioners. As the second step, that the commissioners of each county shall locate its seat. As the third step, that the courts shall be held at those seats. All this accords precisely with the requirements of the Federal law, that the existing third shall continue, until the new third comes in. The language, that those counties "*are hereby*" organized into the third judicial district, is an ungrammatical expression, which intends a future effect, to result from a future act—the act of organization, which is to be; so that "*are hereby*"

Opinion of the Court—Peck, J., dissenting.

signified "shall be" organized into, etc. Sequential to these provisions, in the order of operation, is the one declaring that "Sweetwater and Uinta counties are hereby attached to, and made part of the second judicial district," to be attached, they must be attached by the act; which is the whole source of the expression—the time of the attachment being prospective—the time of attaching arriving when they are severed from the old third. Hence the statute does not contemplate the extension of the second prior to the organization of the new district.

Is it valid? The court must take notice of the geographical status of the Territory, and of all its parts. At the passage of the act each of the counties, proposed for a new district, was in the feeble initial state of development; its population thin, and so small as to be unequal to furnishing the five hundred electors, whose petition for a county organization was requisite by the third section of the Act of December 8th, 1875, Compiled Laws p. 198, providing for the organization of those counties—though men and women were electors; and were in the extreme of disproportion to that of either the first district, or of the second as much larger the population of each of which amounted to thousands; the capital, industry, business of the projected new ones were in the same extreme of disproportion to those of severally the first and second districts: so that the unmistakable purpose of the project was, not to accomplish the idea of an approximate equality, and so to satisfy the organic act, but to promote disparity, and to violate the act. In addition to this extrinsic and characterizing fact, the statute discloses on its face that its direct object is to displace from his sphere the judge, whom it assigns to the new district. This feature involves two other objections—one, that the statute was an attack upon the dignity of the judicial office, and upon the independence and rectitude of the bench—the other, that it is an attempt to frustrate the constitutional action of the Federal government, and thus to conflict with the Constitution. For each of these reasons it was a breach of the trust reposed by the government in the Territory, and void.

Again: the first sentence of section seven of the organic act is by construction not to be read literally, but thus; "all township, district and county officers, not herein otherwise provided for, shall be appointed, or, in such manner as shall be provided by the governor and legislative assembly of the territory, elected;" because the literal reading would pass to the legislature control of the method of appointment, and conflict with the rest of the section on the subject; but the constructive reading keeps the section harmonious. "All officers, not herein otherwise provided for," means those who were to be appointed in the first instance by the governor, and to hold until the end of the first legislative session; that session has passed, that power expired, and no township, district or county officer can now be made, except under the permanent provision of the section—that is, by election or appointment—and if by the latter, by nomination of the governor, confirmed by the council. If the territorial statute is correct in its object, its method for accomplishing the object, defeats it.

Again: to district or re-district, a place or places for holding the court within the given district must, as a part of the process of district organization—which has to succeed the county organization—be designated; but, as no commissioners can be appointed, no designation can be made, and an attempt to re-district under the act would be abortive. But, suppose that the statute had validly provided for the county organization, and the county commissioners, so coming into existence, had designated the places in the district—the entire process of the district organization must be prescribed by "law," which means by the legislature and governor, who—the latter—must have the power to veto or of approval in the matter; the duty is imposed upon their discretion; that discretion applies equally to all the parts of the process, and no part of it can be delegated; it is a trust and cannot be shifted. Hence if the statute succeeds in other respects, it totally fails in this one.

Was the second district judge competent, as such, to sit

Opinion of the Court—Peck, J., dissenting.

in the proceedings, which are under review? The statute above mentioned, relating to his compensation, provides :

Section 1.—That the Hon. J. B. Blair, associate justice of the supreme court of the territory, may have and receive an additional compensation of one thousand dollars per annum for his services as judge of the second judicial district of this territory, in holding terms of court in Albany and Carbon counties, and in Sweetwater and Uinta counties.

Section 2.—That the additional compensation allowed in the preceding section shall be paid in equal quarterly installments from the funds of the treasuries of said counties on warrants which the respective boards of county commissioners of said counties shall cause to be issued, each county aforesaid paying one-fourth of such additional compensation.

Section 3.—That if the said Hon. J. B. Blair do not hold the regular terms of court in said counties of Sweetwater and Uinta, then and in that event sections one and two of this act shall be inoperative and void ; but the county commissioners of Albany county aforesaid may nevertheless allow and cause to be paid to the said Hon. J. B. Blair, as extra compensation for his services, as judge therein, the sum of five hundred dollars per annum, payable quarterly out of the county treasury, as other claims against said county are paid, which additional compensation shall continue to be allowed during the said J. B. Blair's incumbency of the judgeship of the second judicial district aforesaid.

Section 4.—This act to take effect and be in force from and after its passage.

Approved December 15th, 1877.

The two statutes of December 15th are in *pari materia* ; and must be construed as if they were embodied in one ; they stand as one ; and I treat them as if that was their form. The act is imperative that he shall hold the courts in the additional, as well as in the original counties ; and the words in the third section, "that if the said Hon. J. B.

Opinion of the Court—Peck, J., dissenting.

Blair do not hold the regular terms of court in said counties of Sweetwater and Uinta, then and in that event" &c., do not leave it to his election to hold the court in the additional counties, but, anticipating that judicial construction may declare that he cannot hold them, provide that in that event he shall not be compensated for doing it, and that the absolute compensation, previously in the act provided for his holding the courts in Albany and Carbon counties, shall charge to one, which shall be contingent upon the will of Albany county. It becomes his duty to decide preliminarily upon the validity of the act; as no judge may assume to exercise power, before he has ascertained that he has it. In the same breath an act, which is void and unjurisdictional, charges him with its enforcement, and offers him a compensation, which it makes contingent upon his administering the act in the additional counties—doubly contingent—thus also creating in him a direct interest either to pass over the question of validity, and assume jurisdiction in the face of it, or to decide in favor of jurisdiction; and in either case to sit in his own favor; thus offering him a direct pecuniary interest in every proceeding which should come before him under the act. It is true that he might not have been affected by this interest; it is as true that he might have been. Whether he was, or was not, is a question too subtle for the law to enter into; upon the ground of policy, in the interest of pure judicial action it pronounces, upon the fact of interest, that he was incompetent to sit. The record does not show that he was affected by the interest; and it was unnecessary that it should. The case of *Oakley v. Aspinwall et al.*, 3 New York, 547, completely sustains this proposition; and as a consequence, that his sitting here vitiates the judgment of this court—in the case. The affirmance embraces a penalty of five per cent. damages for bringing the case here.

Syllabus.

GRANGER v. LEWIS BROS.

NEW TRIAL.—If the motion for a new trial intelligently refers the court to prior exceptions, it is the duty of the court to investigate them.

IDEM.—On the hearing of a motion for a new trial on the ground that the verdict was not sustained by sufficient evidence, it must appear either that there was a conflict of evidence and that the verdict was against the weight of evidence, or that the case went to the jury on evidence insufficient to establish a *prima facie* case for the plaintiff.

MARRIED WOMEN.—Where there was evidence tending to show that the defendant was a married woman at the commencement of the suit, but it did not appear nor was there evidence tending to show that she was a married woman at the time of sale to her of certain goods for which she was sued alone, *Held*, that at the common law she being under coverture at the time suit was brought, her husband was a necessary co-defendant, and that the act of December 4, 1869, entitled, "An act for the protection of married women," could not apply, nor its effect be considered.

ERROR to the District Court of Albany County.

The action was brought by Lewis Bros. of San Francisco, to recover from Jane Granger a sum of money claimed to be due for certain cigars sold and delivered to her at her request. The answer was a general denial, and also set up that the plaintiff in error was a married woman. The jury rendered a verdict for the plaintiff below.

W. W. Corlett and C. N. Porter, for plaintiff in error.

The first assignment of error complains that the verdict and judgment was not sustained by sufficient evidence. It is true that this court refuses to interfere with a judgment on this ground, unless the same is so strongly opposed to the weight of evidence, as to indicate that the jury must have neglected to properly consider the facts or have overlooked prominent and essential points in the evidence, but in this case, the inference of the appellate court seems peculiarly appropriate.

Argument for Plaintiff in Error.

The *essence* of the action brought is a sale and delivery of personal property, and yet the evidence fails to disclose the slightest hint at such a transaction. The only delivery ever made was not for the purpose of carrying out a contract of sale, but more as a matter of storage. The actions of Agent Leebes were themselves admissions of no prior contract of sale.

As the absence of the testimony indicated relates to the very existence of the contract sued on, the verdict of the jury upon this point is open to attack, not merely as against evidence, but as contrary to law. Lewis Bros. claimed a sale of the goods occurring in August, (see record, pages 8 to 41), and they rely upon no subsequent transaction as showing that fact.

As to the second assignment of error, we submit that the deposition of Samuel Lewis is entirely incompetent and immaterial as being hearsay and not the best evidence.

The third and fourth errors assigned are considered in connection with others; and the fifth, sixth, seventh, eighth and ninth errors depend upon the same question, viz.: the right of the plaintiff in error under the second defense of the answer.

The court should have allowed the question, as to whether or not the plaintiff in error was a married woman, to go to the jury. At common law a married woman cannot be sued at all, and is unable to enter into a contract. The common law is modified by our statute somewhat, and she may in this Territory carry on any trade or business on her sole and separate account, and as to such trade or business she is liable on her contracts and subject to suit in her own name. The answer showing Jane Granger to be a married woman, it must then appear that she is sued on a contract which the statute allows her to make. This becomes a material factor in the plaintiff's case, and the testimony utterly failing to show that she was competent to contract, or such a state of facts as allows her to sue and be sued as a *feme sole*, action could not be sustained, and the ver-

Argument for Defendants in Error.

dict and judgment ought to have been accordingly; but certainly whether Mrs. Granger was capable of contracting or of being sued became a material fact in the case, upon which the jury should have been permitted to pass. Testimony of Adams, Record, page 20; Testimony of Granger, Record, page 34; Compiled Laws, Wyoming, page 481; Wells' Separate Prop. of Married Women, Secs. 1-11, 136-138, 322, 621; *Camden v. Mullen*, 29 Cal., 566; *Holmes v. Holmes*, 40 Conn., 117; *Griffin v. Ragan*, 52 Miss., 81; *Cary v. Dixon*, 51 Miss., 593; *Keen v. Hartman and wife*, 48 Pa. St., 497.

The tenth error assigned is that a certain admission of William Granger was allowed to go to the jury, that constituted no part of the *res gestæ*, and was not admissible even had his agency been proven. See authorities cited to the following point. Considerable testimony relative to acts and conversations of William Granger subsequent to the alleged sale and delivery of the goods, was admitted over the objection of plaintiff in error. They were not admissible, and could not be accepted as evidence to bind the principal. Story on Agency, Secs. 134-137 and 138; Wells' Separate Prop. of Married Women, Sec. 171; *Livesley v. Lasalette*, 28 Wis., 41.

M. C. Brown, for defendants in error.

Before examining the several errors assigned, it may be well to examine the motion for a new trial, for no question omitted therefrom, or not properly presented therein, will now be examined in this court. See *Gibson v. Arnold*, 5th Neb., 186; *Creighton v. Newton*, Id., 100; *Simpson v. Gregg*, Id., 237; *Singleton v. Boyle*, 4th Neb., 413; *N. P. R. R. Co. v. McCarthy*, 1st Neb., 444; *Wells, Fargo & Co. v. Boston*, 3d Neb., 355; *Hawback v. Miller*, 4th Neb., 43.

The first ground is this, to wit: Because the verdict is not sustained by sufficient evidence. As to this proposition, I shall cite no authorities, it having long been the rule

Argument for Defendants in Error.

of this court that it will not disturb the verdict of a jury when there is a conflict of evidence.

The second ground: That the court erred in admitting the deposition of Samuel Lewis over the objection of defendant. It will be seen that the error complained of is not that the court overruled defendant's motion to suppress the deposition. No exception shall be regarded other than for incompetency or irrelevancy, unless made and filed before commencement of trial. See Civil Code, page 79, section 362; title, Exceptions to Depositions. The only objection that can be here considered is irrelevancy and incompetency, even if indeed this objection is presented in motion for new trial so as to preserve it for consideration here. That the deposition of Samuel Lewis is relevant and competent.

The next ground urged for new trial is that the court admitted testimony over the objection of defendant. This is too general either for bill of exceptions, motion for new trial, or assignment of errors. The court will not examine the record at length to find an objection. It must be specifically set out and stated, or the court is not required to notice it. See *Dodge v. The People*, 4th Neb., 231; *Strader v. White*, 2d Neb., 360; *Gibson v. Arnold*, 5th Neb., 186; *Heard v. Dubuque Co. Bank*, 8th Neb., 10; *Lyman v. McMillan*, 8 Neb., 134; *McCormick v. Keith*, 8 Neb., 142; *B. & M. R. R. v. Harris*, 8 Neb., 140; *Torner v. Dinsmore*, 8 Neb., 384; *Meek v. Keene*, 47 Ind., 77; *Horn et al. v. Williams*, 23 Ind., 37; *Morely v. Weblett*, 42 Ind., 85.

The next point urged for new trial is that the court erred in taking issue from the jury. This is too general, but is involved in another point presented, and will be examined therewith.

The fifth ground urged for new trial goes to the instructions given by the court, and is also too general, but is also raised in another objection, numbered six, in said motion, and is as follows: That the court erred in refusing requested instructions by defendant. This is too general, but

Opinion of the Court—Peck, J.

raises the one question, if any are raised, and only one, presented by the record in this case, viz.: Should the husband have been joined with the wife as a party defendant in this case? It is clear that he should not, and that the court in so ruling did not err. Pomeroy's Remedies, sec. 191 *et seq.*; also secs. 234, 235, 236 and 237; also sec. 318 *et seq.*, particularly 322 and 326; *McKime v. McGarvey*, 6th Cal., 497; *Heir v. Staples*, 51 N. Y., 136; see sec. 25, page 37, Compiled Laws; see sec. 22, page 36, Compiled Laws; also chap. 82, page 481, Compiled Laws.

I shall not consider any other point attempted to be urged or presented by the record in this case, for the reason no other is perfectly raised or presented, if indeed this is, and the further reason that if they are, they are too trivial to be urged upon the attention of this court. Upon the whole record it is clear that the judgment is just and should be affirmed. An appellate court will not reverse a judgment unless the result arrived at appears to be unjust. 5 Neb., 484; *Buck v. Waddle*, 1 Ohio, 357; *Bush v. Critchfield*, 5 Ohio, 109; *Allen v. Parish*, 3 Ohio, 107; *Ludlow v. Park*, 4 Ohio, 5; *Jordan v. James*, 5 Ohio, 89; *Hinton v. McNeil*, 5 Ohio, 109.

PECK, J. Lewis Bros., sued Jane Granger in the district court for goods sold and delivered; the answer sets up two defenses, one, the general denial; the other, coverture existing at commencement of the suit and nonjoinder of the husband. The pleadings consist of the petition and answer. The case was tried by a jury and a verdict rendered for the plaintiffs below. Sundry exceptions were taken during the trial by the defendant below; and a proper bill of exceptions was filed, and thus became a part of the record. She reasonably moved for a new trial upon the several grounds, namely: that the verdict was not sustained by sufficient evidence, and was against the law; that the court erred in admitting the deposition of Samuel Lewis, also in admitting evidence against her objection; in taking

Opinion of the Court—Peck, J.

from the jury a material issue of the case; in instructing the jury to disregard evidence adduced to support the second defense; and in refusing to instruct it according to her requests. The motion was duly heard, denied, and a proper exception taken to the denial; and it, the motion, the denial and the exception thereto are a part of the record. The writ of error having been duly returned, she filed an assignment of errors, re-stating with some difference of particularity those that were alleged in the motion; the assignment is more specific and amplified, but not more comprehensive and clear than the motion, and is a part of the record.

Both sides assume that a motion for a new trial by the present plaintiff was necessary to preserve her exceptions; notwithstanding a difference in the court on the subject, we, to dispose of this case, will treat a motion as necessary for that purpose. If necessary, the motion is of the basis of the assignment, and its imperfections cannot be cured by filing an assignment here. The learned counsel for the present defendants object that the motion was too general to point the attention of the district court to the prior exceptions; that the latter were thus lost, and the assignment is valueless. He has cited several cases from Indiana and Nebraska which seem to countenance that proposition. These decisions, however, belong to a vicious practice that acquired growth in this country; is opposed to English rule which is our guide; is utterly adverse to the functions of an appellate court, has no sound principle to rest upon, and no palliation but in the pressure of appellate business—a practice of inventing refinements to smother appeals, to close the door of the courts to the suitor, to worry him by embarrassing and senseless niceties, to treat him as if he was to be heard rather as the recipient of favor, than the representative of right; instead of aiming to examine his complaint to see if, peradventure, he has been wronged; and to the end that whatever wrong has been committed may be righted. This court may not deviate from the better

Opinion of the Court—Peck, J.

law; it must keep in the old path; it must leave the door of review well open, that in the calm atmosphere of a tribunal of final adjudication, errors which have escaped attention below, may be ascertained and corrected, and the relations of the parties adjusted upon their rights. I can conceive of no institution in the judicial system more important than the court of last resort; its importance increases with the increase of litigation, and it should be easy of access.

The true rule upon the subject of the learned counsel's proposition is, that if the motion intelligently refers the court to the prior exceptions, it is the duty of the court to look back into them. This is the rule at common law upon a motion for a new trial based on the judge's minutes; and the present is such a motion in its nature and principle; the transcript of the official stenographer, filed and thus a part of the record, is still the judge's minutes; and this motion is based upon such a transcript. By this rule it will be found that the motion now before us is sufficiently definitive, clearly referring the court to the prior exceptions; also to the objection, that the verdict was not sustained by sufficient evidence—an objection which might be raised by the motion without prior exception.

The first ground of the motion is, that the verdict was rendered without sufficient evidence, and against the law. To have been rendered without sufficient evidence, there must either have been a conflict, and the verdict against the weight of evidence, and by a rule precise, clear and technical; it was then the duty of the lower court to relieve her of the verdict; or the case must have gone to the jury on evidence insufficient to establish a *prima facie* case for the plaintiff, and then it was the duty of that court to vacate the verdict, though the defendant had omitted to claim before the jury was sent out, a non-suit, and that was its duty, because notwithstanding this neglect of the defendant, the verdict had no basis, and if any ruling of the court on the trial, either in the course of the evidence, or in instructing

Opinion of the Court—Peck, J.

or refusing to instruct the jury, error was committed against the defendant below, that error must have served to produce the verdict, and the verdict have been against law; thus each specification of this two-fold ground of the motion, intelligently referred the court to error in the trial, if error existed, entitled the mover to a new trial, and made it the duty of the district court, and makes it our duty, to look back, and see whether there was error; so that this first ground alleged in the motion suffices to secure for the party a thorough examination of the previous case without further complaint; and the additional specifications in the motion were and are superfluous.

But rejecting the first ground, the subsequent grounds are so specified as to unmistakably connect themselves with the prior parts of the case, to which they refer; whether erroneously or not, the district court did admit the deposition of Samuel Lewis and other evidence against the objection of the defendant, and the record unmistakably identifies the evidence and the corresponding exceptions; it did instruct the jury to disregard the evidence adduced in support of the second defense, and withdrew the issue presented by that defense, from the jury; and the second clearly identifies these instructions, and the exception that was taken to them; it did refuse to instruct according to her requests, and the record fully identifies the refusals and the exceptions that were taken to them. This brings us to the merits of the exceptions. We will consider them in their order, as they stand in the record.

The plaintiffs below offered the deposition of one of their firm, Samuel Lewis, which was objected to as "hearsay, incompetent and irrelevant," without specifying a particular part as objectionable, but predicating the objection of the entire deposition. The witness testified only as to a sale as made by this firm, of cigars to the defendant, to the prices, certain credits allowed upon the sale, delivery to and non-payment by her; also to his age, residence, occupation and the composition of his firm. His entire evidence was

Opinion of the Court—Peck, J.

relevant, and the objection for irrelevancy was unsound. As to the objection that the deposition was hearsay and incompetent; more or less of it was founded on personal knowledge, for aught that can be seen to the contrary,—it was not open to this objection as a whole,—and if any part of it was so obnoxious, it was the duty of the objector to point it out specifically to the court, and for want of the specification it was defective; but no part would have been so specified, unless the statement of the witness that the firm sold and shipped the goods from San Francisco to the defendant at Rawlins in this territory, “*through its agent* ;” whether this statement was hearsay or not, would depend upon how the witness got his information; if he obtained it from the agent it was hearsay, if from the defendant, it was personal; the deposition does not indicate the source, and as long as the deponent might have had personal knowledge on the subject, we cannot say that he had not. Hence the entire objection failed, and the deposition was properly admitted. The plaintiffs below introduced evidence in their opening, that in August, 1875, they sold the defendant below 7,975 cigars of various brands, and on the 23d of the month shipped them in three cases from San Francisco to her at Rawlins, addressed “Jane Granger, Rawlins, Wyoming.” This last-mentioned evidence was by three witnesses, who testified by depositions taken in 1877 and 1878, and speak of her as “Mrs. Jane Granger;” but there is nothing in their evidence to indicate that that was anything else than their description of her at the time of testifying; and if their evidence can be understood as so describing her at the time of the alleged sale, it has no tendency to show that she was then, or afterwards, married. Next after the reading of the depositions, the plaintiffs introduced as a witness, Joseph B. Adams, who on his direct examination in chief was asked, if he knew the defendant, Jane Granger, in July and August of 1875; having answered that he did, he was asked what, if any, business she was doing then; to which question her counsel objected, on the ground that the hus-

Opinion of the Court—Peck, J.

band must be co-defendant with the wife, unless it appears that the action relates to her sole and separate property, for which purpose it must be so alleged in the petition, and the allegation be supported by proof; and further objected to the introduction of any proof by the plaintiff that she was carrying on business on her own account, or that it was her sole and separate business or property; and, so further objected on the ground that such evidence would be irrelevant, improper and not confined to the issue. The objection was overruled, and an exception taken.

The objection was alternative, assuming for its basis, first, that it already appeared that the defendant was under coverture at the time of sale and commencement of the action; and, secondly, that the question tended to show that in July and August, 1875, she was carrying on business on her own account, or that the action related to her sole and separate property; coverture had not appeared, nor was there in the case any testimony tending to establish it; there was therefore, no ground for the objection, and it is unnecessary for us to decide whether the exception that it specifies is recognized by the statute, or if recognized, whether it is conditioned by the rule of pleading that the objection specifies. The objection was properly overruled.

The witness then answered, that she was doing a general merchandising business in groceries and dry goods, (adding) and at Rawlins. Continuing, and on the same examination, he stated that during those months he was agent there for the Union Pacific Railroad Company; and was then asked, if during that August, as such agent, he received these goods, "marked to Mrs. Jane Granger;" the question was objected to as incompetent, irrelevant and immaterial; the objection was overruled, and an exception taken. The objection was apparently a renewal of the last one, and was properly overruled. He answered that he did; that he received goods for her every month. Proceeding, and upon the same examination, the witness testified that he, as such agent, received there in or near August, 1875, two cases of

Opinion of the Court—Peck, J.

cigars from Lewis Brothers, marked to Jane Granger, at Rawlins, and that they were delivered to William Granger; that the cigars were in boxes made of very thin boards,—as he supposed, regular cigar boxes; the witness was then asked for whom they were delivered to William Granger; she objected to the question for irrelevancy, immateriality and incompetency; the objection was overruled and an exception taken. The question had but one of two tendencies: either to show a delivery to William Granger for another party than Jane Granger, and, therefore, they were not for her, and in that view it was unfavorable to the prosecution, and favorable to the defendant; or to show that they were delivered to her by being delivered to him, which was simply showing what the plaintiffs might show at that stage of the case. The objection was properly overruled. The witness answered that the two boxes were delivered to William Granger, for Jane Granger. This evidence, coupled with other evidence tending to show that they passed from William to Jane, or that he was her agent to receive them, or, if not, that she ratified his receiving them, and the evidence credited by the jury, the plaintiff would have established a delivery to the defendant, either by a delivery to her in person, or by a delivery to her agent; thus illustrating the propriety of the question. On cross-examination the witness stated that he did not know the contents of the boxes. And during this examination he was questioned by the court, and answered as follows, and without objection:

Question. Was Mr. Granger acting as the agent for anyone; or was it for himself he was receiving those boxes?

Answer. He was receiving them as I supposed, the same as he was receiving all of Jane Granger's goods; he received them and transacted business in her name.

Question. He was acting as agent, then, in this transaction?

Answer. That was my understanding of the matter.

So much of the first of those two questions as asked whether William Granger received the boxes for himself,

Opinion of the Court—Peck, J.

and so much of his answer as stated that he was receiving all (meaning all the other goods) and transacting business in her name, was proper; the residue of the question, because calling for, and the residue of the answer, because expressing the opinion of the witness, were improper; for this reason the second question and its answer were improper. Though the defendant made no objection to these improper parts at the time, we are not prepared to say that she might not at any time afterwards during the trial have had them stricken out; nor that they did not in law stand as stricken out from the first; and for the purposes of the objection, which we must come to, we treat them, as if they had been stricken out. So stricken out, the remaining and unexceptionable evidence of the witness was, that before the arrival of the two boxes at Rawlins he, as the agent of the railroad company, had received these goods for Jane Granger monthly, and that William Granger had received them all from the company, and had transacted business in her name; this evidence tended to show that the latter had received the prior arrivals as her agent, and was her general agent in her trades; and that was the capacity with which the testimony had clothed him down to the putting of the question, which we next consider.

At the close of his re-examination the witness left the stand, and then by leave of the court was recalled by the plaintiffs, and was asked by the court: "What did Mr. Granger say, if anything, as to the contents of those boxes?" (meaning the boxes in question); the defendant objected, unless it was shown that William Granger was agent of Jane Granger. The objection conceding the propriety of the question, provided the agency appeared, the objection was overruled and an exception taken. As the agency had been shown, the objection defeated itself by its own limitation, and was properly overruled.

The witness' cross-examination tended to show that when the two boxes arrived in August the Grangers refused to receive them; that in October following, the agent of

Opinion of the Court—Peck, J.

Lewis Bros. was there and agreed with William Granger that, to save the firm expense of storage with the railroad company, and so for the accommodation of the firm, he, Granger, should pay the freight upon them, and take them into his possession, but with the further condition that, should he want them, he was to retain and pay for them,—not wanting them, that they should be subject to the disposal of the firm; that he thereupon paid the freight, and took the two cases into his possession accordingly. Having been so recalled by the plaintiff he stated, without objection from the defendant, that on a subsequent occasion at Rawlins this agent of the firm demanded of William Granger payment for the two cases; that the latter objected on the ground that one of them had not been received by him; to which the agent replied that it might be in his cellar, and proposed that a search be made there for it, but Granger objected; that a conversation then followed between them; at this point the plaintiff called for the conversation—the question was objected to for irrelevancy and immateriality; the objection was overruled and an exception taken. When the objection was ruled upon, all that appeared of the conversation was, that it was based upon the demand, and led to the search. Upon the assumption that the jury would find that William Granger was a principal in the October arrangement, and the defendant not the vendee of the two boxes, the conversation would be irrelevant, and therefore immaterial. But they might find that he was her agent in that arrangement, and as such took the possession of the boxes, and that she therefore was the vendee; in this alternative he would, in the absence of further explanation, stand as having possession at the time of the demand, and in that capacity; the demand was in effect to pay, or return; it was a demand upon him as her agent, to account for the property; it was then as relevant to prove the conversation as it was to prove the demand which led to it; as it was to prove the search which resulted from it; and the pertinency in proof of the demand and search was neither questioned,

nor could it be intelligently questioned. The objection was properly overruled.

The plaintiffs rested, and the defendant introduced evidence tending to show that she was a married woman at the time of the commencement of the suit. She requested the court to instruct the jury that if they should find that she was a married woman then a verdict should be returned for her; the court refused so to instruct, but did instruct that the question whether she was then married, was not a question for them; and she excepted to the refusal to instruct, as so requested, and to the instruction as so given.

The plaintiffs' claim was founded on the theory, and their proof tended to show that when the alleged sale was made, the defendant was conducting at Rawlins a trade on her sole and separate account, and that the merchandise in question was sold and delivered to her for that trade; but it did not appear, nor was there evidence tending to show that she was married at the time of the sale; the consequence was that at the common law, she being under coverture when the suit was brought, the husband was a necessary co-defendant. Had it appeared in the case, or had the evidence tended to show that she was under coverture at the time of sale and institution of suit, it would have become necessary to determine the effect upon the case of the act of December 4th, 1869, which at its section 5 on page 481 of the Compilation permits a married woman to conduct trade on her sole and separate account; and to sue and be sued as if she were a *feme sole*; it would have been necessary to determine that effect, provided the act was in force in that particular as to suit, when the trial was had; but in the present state of the case that act cannot apply, and its effect cannot be considered. As the evidence tended to support the second defense; it was error in the district court to withdraw that evidence from the jury.

The defendant also excepted to the instruction and to each and every part thereof. This was an exception to the charge as a whole, not calling attention to any particular

Opinion of the Court—Sener, C. J., dissenting.

part; therefore reached no defect, if there was any besides that which we have considered; but there was no other. The rest of the charge was upon the first issue and consisted in submitting it to the jury. This leads to the objection that the verdict was not sustained by sufficient evidence; it was based upon the first issue, the evidence under this issue was conflicting, and we cannot say that the jury arrived at an erroneous conclusion from it.

This disposes of all the objections that were taken below by the plaintiff in error.

The judgment rendered below is reversed—the case remanded and a new trial ordered.

BLAIR, J. I concur with my brother Justice Peck in reversing the judgment rendered in this case in the court below, upon the ground, that the court took from the jury the issue as to whether Jane Granger was a married woman.

As to the other points complained of I express no opinion.

Judgment reversed.

SENER, C. J., dissenting.

This was an action brought in Carbon county and afterwards removed to Albany county. It was brought by Lewis Bros. of San Francisco to recover from Jane Granger a balance of \$156.87 and interest, for certain cigars sold and delivered to her at her request, as alleged in the petition bringing the suit. The answer was a general denial, and also set up that the defendant was a married woman, having a living husband named William Granger, and claimed that he ought to be joined as a party defendant, and concluded that she ought to be dismissed with costs.

The court proceeded to try the case with the aid of a jury. a verdict was rendered for the plaintiffs, Lewis Bros., and upon this a judgment was entered; after a motion for

Opinion of the Court—Sener, C. J., dissenting.

a new trial had been made, argued, and overruled, the defendant below has brought into this court a writ of error to have the judgment of the court below reversed.

There are twelve assignments of error made by counsel in their written assignments filed in this case, but there were only six assignments of error embraced in the motion for a new trial, and the counsel in their printed brief reduced their points or assignment of errors to six.

I think under rule No. 5 of this court, that counsel or litigants can only be heard here in support of such assignments of error as were specifically made, pointed out and embraced in the motion for a new trial in the court below; what was relied on there, must be relied on here. No more can be asked of the court here, than was asked of the court below; what was not specifically pointed out in the motion for a new trial, though excepted to during the running of the trial, must be taken to be waived in the court below and so cannot be availed of here. Rule 5 of this court is explicit: "No case will be heard in court unless a motion for a new trial shall have been made in the court below, *in which all matters of error and exceptions* have been presented, argued, and the motion overruled and exceptions taken to the overruling of said motion, all to be embraced in the bill of exceptions." As was said by the court in *Dodge v. The People*, "all the reasons known for setting aside the verdict and granting a new trial should be set forth in the motion for a new trial," 4 Neb., 231; and again the court in 8 Neb. 134, *Lyman v. McMillan*, says, "To lay the foundation for a review by the supreme court, of questions raised and decided on the trial in the court below, it is necessary that the particular errors relied on be first assigned in the motion for a new trial."

The first exception or assignment of errors which I shall notice, is the fifth, which is in these words: "Because the court erred in instructing the jury to pay no attention to the evidence to sustain the second defense of the defendant's answer." Now the second part of the defendant's answer set up the fact that the defendant was a married woman

Opinion of the Court—Sener, C. J., dissenting.

with a living husband at the time suit was brought, and that the husband, William Granger, should have been joined with her as a party defendant.

Was there error in this? Practically the second part of the defendant's answer, or defense, was in the nature of a demurrer alleging a defect of parties defendant.

The court did not proceed at once to determine that question as it might have done, to have seen its bearing upon the case, but treated that part of the defense as an answer. Now was it any defense that should have gone to the jury? or could its going to the jury have affected the case in the least? Clearly the court was right in saying that the husband ought not to have been joined with the wife as a defendant. For I think it very clearly established by the testimony of Adams that the wife was conducting, or to use his language, "doing a general merchandise business, groceries and dry goods," and on this point lies testimony not impeached. She was carrying on a business, I think, as contemplated by sec. 5 of the Married Woman's Act, p. 481, ch. 82 of the Compiled Laws of Wyoming, and that section provides that in respect to such business she may sue and be sued alone. If this be true, what object could there be in joining her husband with her? Clearly none.

But it was claimed in argument at bar that sec. 25 of the Wyoming Code of 1876 provided that, "when a married woman is a party her husband shall be joined with her except:

"I. When the action concerns her separate property she may sue alone."

"II. When the action is between herself and husband she may sue or be sued alone." And as this act was passed in 1873, and the Married Woman's Act in 1869, it was maintained that the act first cited repealed by implication the authority to sue a married woman as a *feme sole*.

I think not. At the session of the fourth legislative assembly in 1875, an effort was made to codify the laws, and by sec. 2, of the act of Dec. 11, 1875, entitled "An

Opinion of the Court—Sener, C. J., dissenting.

act to compile and publish the laws of Wyoming in one volume," it was provided that it should be the duty of a joint committee to cause each law of the Territory that may be in force at the close of the present session to be published as it may exist at that time," and further, that all were to be published as the "Compiled Laws of Wyoming." Under and by virtue of this authority, both sec. 25 of the Code, and the Married Woman's Act appear in the compilation. Now can they be so construed that both shall stand? I think so, by treating the authority to sue a married woman as a *feme sole*, as but a further exception to sec. 25 of the Code. If it be said, as against this view, that the exception practically explains away the general rule of the 25th sec., the answer must be, I think, that the legislature so meant and has so said, and it is but giving expression to what they have said. The execution should follow the judgment. And it is expressly provided in the Married Woman's Act, that the property of a married woman may be taken on execution against her. This view preserves the Married Woman's Act in its entirety, and carries out the theory that underlies its construction, viz.: that a married woman may not only contract independently of her husband, but may be made liable for her contracts without the joinder of her husband with her in the suit, and that separate judgment and execution may follow in such suit and as a result of it. True, the compilation has never been formally adopted by the legislature, by an act in terms legalizing the whole of it, yet the purpose was to publish every act as it then existed. Since then two legislative assemblies have met, and the compilation has been recognized in at least six acts of the two bodies; laws being passed to amend the compilation and the amended laws, and those amended laws have recognized the compilation in unmistakable terms, and seven laws have been amended and changed. May it not be fairly inferred that this compilation made in pursuance of an act of the legislature, was satisfactory to it in so far as the same has not been altered

Opinion of the Court—Sener, C. J., dissenting.

or changed,—both statutes are maintained as evidently was the purpose of the legislature. The very object of the compilation, was a harmonious code of laws, readily to be found in a single volume, and each and all speaking with the same force and equal authority and to be construed, if possible, as acting together, which is done by this view.

The case just cited in the 6th of California, contained a statute which was in the very same words of our 25th section of the Code, and was silent as to any authority to sue a married woman as a *feme sole*; but the supreme court of that state held that a married woman was not only suable alone in respect to her business, as sole trader or as a *feme sole*, but that it was error on demurrer to join her husband with her. Nor is it necessary to sue the married woman in any manner different from that which would be followed in suing her as a *feme sole*. The object is to remove the coverture and to treat her in the suit as if it never existed. The court in 57 N. Y., p. 136, decided in 1872, *Hier v. Stabler*, say, “in an action upon a contract executed by a married woman, it is not necessary to allege in the complaint that the contract was executed in her business or for the benefit of her separate estate. Nor is it necessary to ask judgment charging her separate estate; but the complaint may be framed as if the defendant were a *feme sole*, and if coverture is interposed as a defense, testimony proving the contract enforceable against a *feme covert* is proper in reply.”

Having ascertained that there was no error in the failure to join the husband as a party defendant, was it error in the court to say to the jury, that they had nothing to do with the question of whether the defendant was a married woman or not? Possibly it would have been better for the court to have said, that the fact of the proof of the defendant being a married woman could not relieve her from liability for her debts contracted in and about her separate business, and although she may be a married woman, yet if she was conducting a separate business, and

Opinion of the Court—Sener, C. J., dissenting.

contracted and has not paid this debt, she is liable in this action, and you must so find. Yet I cannot say the court erred. The defendant was carrying on a separate business on her own account, as I think was clearly proved, and the plaintiff properly introduced testimony to show the contract enforceable against her as a married woman, to wit: that she had been doing business on her sole and separate account. If she had bought these cigars as a *feme sole* she was liable. If she bought them in her sole and separate business as a married woman, she was liable; her husband could not be joined in an action relating to her separate business, and how she was prejudiced by the court in its instructions I cannot see; and unless she was, I think the court committed no such error as she can complain of here, and therefore I think the fifth assignment of errors not good.

The second assignment of errors is to the admission of the deposition of Samuel Lewis, the California merchant, who shipped the goods; the deposition was certainly good as a link in the chain, showing that Lewis Bros. shipped the goods conformably to the request of Mr. Leebees, who swears that he sold the bill of goods to Jane Granger in August, 1875, and that he had dealings with her theretofore; this latter evidence tending to prove Jane Granger carrying on business in her own name, and so admissible.

As to the fact of the goods being shipped conformably to Leebees' direction, this was fully proved by Barton, the shipping clerk of Lewis Bros.

The third assignment of errors is because the court erred in admitting the evidence to which the defendant objected. This, in my opinion, is too indefinite: *vide*, *Lyman v. Mc Millan*, 8 Neb., and *B. & M. R. R. Co. v. Harris*, 8 Neb., 14. It does not apprise this court of the particular testimony in which the alleged errors occurred; it should do so specifically, that this court may know what exceptions taken during the trial were really relied on in the motion for a new trial. If it is said, as it was, that an inspection

Opinion of the Court—Sener, C. J., dissenting.

of the whole record will show, it will be a sufficient answer to say that even if we relied on the written assignment, shown here for the first time, the twelve assignments of errors relied on by the plaintiff in error, that they do not embrace or point out as error all the exceptions taken by the counsel for the defendant in the court below; but if they did there would be nothing in the record to show that they were all relied on in the motion for the new trial, for clearly the record brought here does not show it. It is hardly probable in any case that every ruling of an inferior court in the trial of any case is erroneous, to which counsel often hurriedly excepts; they are saved often to give time to consider them more maturely, and often are then seen to be right, and so abandoned in the motion for a new trial. Be this as it may, the exceptions relied on are not specifically pointed out, and therefore I cannot hunt through the record to find the exceptions taken, and if I did, as I have said before, I could not know what was really relied on as errors in the motion for a new trial.

The fourth and sixth assignment of errors are as follows: The fourth, because the court erred in taking from the jury a material issue in the case; the sixth, because the court refused to give the jury instructions asked for by the defendant.

These two assignments are really but one. The issue claimed to be taken away was this instruction; one of the issues presented in the answer, is that the defendant at the time of the commencement of this suit was a married woman, having a husband then living, which fact was well known to the plaintiffs, and that they failed to join him in this suit. There was no error in the failure to join the defendant's husband. I have so argued, and practically the court below so decided. It was for the court, a question of law on the facts upon which there was no issue of fact to go to the jury; for her marriage was never controverted or her having a husband living at the time the suit was brought. The real issue was, did the defendant purchase

Opinion of the Court—Sener, C. J., dissenting.

the plaintiff's goods? and if so, even if she was a married woman, was she carrying on a sole and separate business for herself? These facts were substantially found by the jury in their verdict. They were the real issues presented and decided, and the court, as I think, took from the jury no material issue, if indeed any issue at all. It simply refused, as it had a right to do, an instruction which might have misled the jury.

The first error assigned we come now to consider, and it is the last to be decided; it is this: "Because the verdict was not sustained by sufficient evidence, and is contrary to law." If the evidence was sufficient, I have no doubt the law was. There was a conflict of evidence, but the jury that tried the case resolved the conflicts and disagreements in favor of the plaintiffs, as was their peculiar province. The court, trying the case below, refused to disturb the verdict then and there found; certainly, not because there is a conflict of testimony, for this has repeatedly been decided otherwise. If because, as is alleged, of insufficiency of testimony, I have only to say, that the jury thought and held the evidence sufficient, the court, hearing all the case, concurred, and I will not disturb the conclusions they reached.

For these reasons, I am of opinion to affirm the judgment of the court below.

SNYDER v. JAMES.

ERROR.—Under section 522, of the Compiled Laws, proceedings in error not brought within one year after the date of the judgment below, will be dismissed on motion.

ERROR to the District Court of Laramie County.

In the court below judgment was rendered in favor of

Statement of Facts.

the defendant in error, on the 15th day of July, 1878, and the motion for a new trial was overruled on July 30th, 1878. The precipe for writ of error was filed in the supreme court on the 30th of July, 1879, and a writ of error issued on the same date. The writ of error, together with a transcript of the record, was returned on the 15th of August, 1879.

A motion was made to dismiss the proceedings in error on the ground that they were not commenced within the time prescribed by law.

E. W. Mann, for plaintiff in error.

The question presented for decision by the motion to dismiss is, whether the appellate proceedings were commenced within the time limited by law. Code of Civil Procedure, sec. 522, Laws of 1877, page 23.

In this case a judgment was rendered in the district court, July 15th, 1878. This judgment was modified and the amount reduced July 30th, 1878.

The precipe for writ of error was filed in the supreme court, July 30th, 1879, and the writ of error issued the same day. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation must be calculated accordingly. *Brooks v. Norris*, 11 Howard, 204.

It does not appear from the return of the clerk of the district court at what time the writ was filed in that court. The court will not, therefore, presume that the writ was not filed within the time required by law.

The question then arises, Which was the final judgment in the case, the judgment of July 15th or the judgment of July 30th? A judgment is the final determination of the rights of parties in action. Code of Civil Procedure, sec. 377; Compiled Laws, page 82. The two judgments, before referred to, appear on pages 28 and 29 of the transcript. It is evident that the judgment of July 30th was the final determination of the rights of the parties in action, as no

Argument for Defendant in Error.

attempt was made to enter that judgment as of the date of the former judgment. The court has power to vacate judgments during the term at which they were rendered. Freeman on Judgments, sec. 90. The motion to dismiss the appeal should, therefore, be overruled

C. N. Potter, for defendant in error.

The civil code, as amended, provides that no proceedings for reversing, vacating or modifying judgments, or final orders, shall be commenced unless within one year after the rendition of the judgment or making the final order complained of, with certain exceptions not applicable here. Compiled Laws, Wyo., sec. 522, page 105; Laws of Wyo., 1877, page 23.

The judgment in the case having been rendered July 15th, 1878, then these proceedings were commenced more than a year afterwards. It is the judgment and not the overruling of the motion for a new trial that is appealed from or that is desired to be reversed. The rule of court providing that no case will be considered until motion for new trial has been heard in court below, does not and could not change or affect the proper construction of the statute. Compiled Laws Wyo., sec. 522, page 105; Laws of 1877, page 23; Compiled Laws Wyo., sec. 512, page 103. And the assignment of errors alleged error in rendering judgment, &c.

But if it was true that the overruling of the motion for new trial is the order of which reversal is asked, then the proceedings are not commenced within the year. The filing of precipe for, or issuance of, writ of error does not determine the commencement of the proceedings. They are not deemed to be commenced until the writ of error, together with the transcript, is returned to and filed in the supreme court. When proceedings are commenced by petition in error, they are not considered commenced until service of summons in error, and in such cases the transcript is filed

Opinion of the Court—Sener, C. J.

with the petition. *Robinson v. Orr*, 16 Ohio Stat., 285; *Buckingham v. Commercial Bank of Cincinnati*, 21 Ohio Stat., 131.

SENER, C. J. It seems to the court that the judgment entered in this cause must have been the judgment of the court entered July 15th, 1878. That in our opinion was the final determination of the rights of the parties in this action, so far as the matters in controversy rested with the district court for Laramie county for determination.

It is true there is a journal entry certified in the cause, showing that on the 30th day of July, 1878, the plaintiff and defendant appeared in the district court and then and there the plaintiff agreed to a remittitur or reduction and modification of the judgment entered July 15, 1878; but that very entry made by agreement, created no judgment as of July 30, 1878, but expressly and in terms recognized the judgment of July 15, 1878, as the judgment entered by the court in this cause, describing it as the judgment of July 15, 1878; and declaring that the same, *i. e.*, the judgment of July 15, 1878, should be reduced and modified to the amount therein stated. How easy, if it had been the intention of the court to have made a new judgment in lieu of the judgment of July 15, 1878, to have said so in words not capable of being misunderstood; on the contrary, nothing of the kind appears.

It is shown that a remittitur was entered, but Bouvier treats a remittitur as the act of the plaintiff—the act of one party to the suit—while the judgment in this case is the act of the court upon the pleadings arising in the cause, and the final determination of the right of the parties in the action, so far as they were presented to the court for determination. The judgment of July 15, 1878, notwithstanding the remittitur of the plaintiff, of July 30, 1878, remained the judgment of the court.

The remittitur in this case, it seems to us, was no more than the consent of the parties to such modification or

Opinion of the Court—Sener, C. J.

reduction of the judgment, as by an agreement. It might have been made just as well in the clerk's office, on the back of the judgment, or in the execution on the judgment in the sheriff's hands, had one issued, save for the value of the journal entry as record evidence.

For the purpose of enlarging the time within which the judgment of July 15, 1878, may be brought into this court for review by writ of error, the remittitur, being the act of the plaintiff, or if you please, the act of both parties, gives it in our opinion no value. To do so would be to put it in the power of litigants, or one of them, to extend the provisions of the statute, as to the time within which writs of error may be brought into this court to review the judgments of courts below, which, of course, cannot be done.

It follows, therefore, that proceedings not having been commenced in this court within one year from the time the said judgment of July 15, 1878, was rendered in the district court as aforesaid, for reversing, vacating or modifying it, that the motion of the defendant in error is well taken.

This being our view on this branch of the motion to dismiss, as submitted to the court, renders it unnecessary to consider the other question presented, viz.: as to when proceedings in error, to reverse, vacate or modify the judgment of the court below, were begun in this case in this court.

For the reasons stated, it seems to the court that the motion to dismiss this case is properly taken; and therefore the proceedings in error will be dismissed, and the judgment of the district court affirmed, but as it appears to the court that there were reasonable grounds for the proceedings in error, the five per cent. mentioned in the statute will not be allowed in this case.

Writ of error dismissed.

GARBANATI v. THE BOARD OF COUNTY COMMISSIONERS
OF UINTA COUNTY.

ERROR.—The supreme court will not consider alleged errors in the record unless accompanied by a bill of exceptions, in which the motion for a new trial, made in the court below, is incorporated.

ERROR to the District Court of Uinta County.

On the 2d of December, 1878, H. Garbanati, the plaintiff in error, presented a bill to the board of county commissioners of Uinta county for \$935, for fees as county and prosecuting attorney for Uinta county. The board disallowed the bill and Garbanati appealed to the district court, where the case was tried on the 11th of January, 1879, and a judgment rendered for the defendant, the board of county commissioners.

No bill of exceptions had been signed as required by Rule 5 of the supreme court, and the defendant in error moved to dismiss the proceedings in error on the ground of irregularity.

H. Garbanati, for plaintiff in error.

W. W. Corlett, for defendant in error.

BLAIR, J. This case must go where many have gone before, and where, doubtless, if we can judge the future by the past, many will follow it: out of court. Almost from the time whereof the memory of man runneth not to the contrary, this court by a standing rule has declared, that they will not consider alleged errors in a record unless accompanied by a bill of exceptions, in which the motion for a new trial made in the court below is incorporated. In this case there is no bill, or pretended bill of exceptions, duly allowed by the court below, and, reasoning from cause to effect, the absence of the motion for a new trial is apparent.

The motion of the defendant in error is sustained, and writ of error dismissed.

Opinion of the Court—Peck, J., dissenting.

Ordered accordingly.

PECK, J., dissenting.

The precipe, writ of error, its answer embracing a transcript and the assignment of errors constitute the proceedings of error in this case on the part of the plaintiff. Judgment was rendered below against him, the plaintiff there, on the merits upon a trial by the court without a jury. An allegation that the transcript was not paged, numbered or annotated, that a motion for a new trial was not made there, nor a bill of exceptions allowed, that no exception was taken to the findings, or to the order of judgment, and that a proper assignment of errors had not been, filed the defendant moved "to dismiss the proceedings in error and to affirm the judgment." The motion asked in the conjunctive and cumulative for two remedies, which antagonize each other—the granting of one of which rendered it impossible to grant the other; because dismissing the proceedings would have sent them out of court, and have left here nothing to review for the purpose of affirming—no basis of affirmance, and affirming would have retained them; therefore the motion contradicted and nullified itself and was absurd. Nor could the court have granted one branch of the motion, ignoring the other; for that would have been a re-shaping of the motion; it could sit only upon the motion as presented; granting or denying it according to its merits—therefore denying what precluded the power to grant. If the mover desired the benefit of both grounds, he should have framed his motion in the disjunctive—the alternative. But the court has done more by the mover than he asked for: it not only has not granted one branch, ignoring the other; but, committing a worse absurdity than what the motion involved, it has assumed to grant both branches, for it has entered a judgment of dismissal and affirmance—one, that contradicts and nullifies itself—a judgment having form but no effect.

The second however presents a graver defect. The pro

Statement of Facts.

ceedings were held below by the second judicial district court as sitting in and for Uinta county; and by the Hon. Jacob B. Blair, the judge of that district. No allegation of error was made below or assigned here, nor was objection taken in argument here for want of jurisdiction in the lower court or of competency as judge, in the judge who held it. For the reasons which are stated in my dissenting opinion filed in the case of this plaintiff against Beekwith & Co., which has been decided by the court at this term, the second judicial district court had no jurisdiction in that county; nor was that judge competent as a judge to sit below or here; so that the proceedings below and the action of the majority of this court in the case here were void. The judgment, which was rendered below, should have been reversed, and the action dismissed, that judge was sitting.

THE BOARD OF COUNTY COMMISSIONERS OF SWEET-
WATER COUNTY v. JOHNSON.

FEES: JAILER.—Chapter 49, section 12 of the Compiled Laws provides, "That for any service rendered by an officer wherein no fees are allowed by this act, nor any other act or provision of law, such officer shall be allowed a reasonable compensation therefor." *Held*, this provision did not apply to the payment for services of a jailer who had been hired by the sheriff.

ERROR to the District Court of Sweetwater County.

The origin of this case was a bill presented against said Sweetwater county on the 6th day of May, 1879, by defendant in error, which was as follows:

"The county of Sweetwater, Wyo. Ter.,	Dr.
To W. A. Johnson, Sheriff in and for Sweet-	
water County, Wyoming Territory, to services	
of Frank Shulter as jailer for the months of	
January, February and March, 1879, at \$90.00	
per month	\$270 00

Argument for Plaintiff in Error.

The county commissioners rejected the bill and Johnson appealed to the district court, where he filed a petition setting forth his cause of action. The defendant, the board of commissioners, filed a demurrer to the petition on the ground that the facts stated in the petition did not constitute a cause of action. The court overruled the demurrer, the defendant then answered denying all the allegations of the petition. The case was tried by a jury, resulting in a verdict for the plaintiff below for \$270.00 and costs.

L. B. Gibson and W. W. Corlett, for plaintiff in error.

The first error assigned, to which the attention of this court is now invited, was the action of the said district court in overruling the demurrer of the defendant in the said district court to the petition of the plaintiff. It seems from the said petition that the plaintiff employed a jailer to take charge of the jail in Sweetwater county, whereof the plaintiff was sheriff, for the months of January, February and March, 1879, and paid him \$90.00 per month for that time, and now claims the right to recover that sum from the county. The plaintiff further alleges that he was compelled to hire said jailer, in addition to his regular deputy, in order to keep prisoners, by reason of the jail of the county being defective.

We hold that if all these facts were true, they furnish no ground of recovery in this action; that it is the duty of the sheriff of that county to keep and maintain the prisoners in said county properly and safely for the sum of seventy-five cents per day for each prisoner and for the salary payable to said sheriff by said county, and that if, for any reason, it became necessary for him to hire a jailer he was bound to pay the jailer himself, and has no claim against the county for the sum so paid. The general powers of a sheriff are prescribed by Article IV. of an act defining the duties of county officers. Compiled Laws, pp. 211, 212, 213. Section 4 of said article is as follows:

Argument for Plaintiff in Error.

“The sheriff shall have charge and custody of the jails of his county, and of the provisions in the same, and shall keep them himself, or by his deputy, or jailer, whom he may appoint specially for that purpose, and for whose acts he and his sureties shall be liable.”

Chapter 66 of the Compiled Laws, page 380, provides especially for the erection of the jails and the manner in which they shall be kept, and also prescribes the authority that shall cause them to be erected and kept in repair. Section 6 of said last named act provides that the sheriff shall provide medical attendance and certain other necessities for the jail which shall constitute a charge against the county. Article I. of the aforesaid act, defining the duties of county officers, defines the duties of the board of county commissioners, and expressly vests that board with the authority to keep the jail in repair, and further provides in whom the power to act for and bind the county shall reside. See Compiled Laws, pp. 202—206, sections 1, 2, 3, 4, 5, 6, 9, 11, 15, 21. Originally the sheriff was paid one dollar per day for keeping each prisoner in his custody, see Compiled Laws, p. 342, sec. 2; and until Jan. 1st, 1878, was paid for his services by fees and commissions.

On Dec. 15, 1877, the legislature passed a law regulating the compensation of sheriff of Sweetwater county, which was as follows:

“Sec. 2. The sheriff of said county shall be entitled to the following annual salary and allowances, to-wit: Three thousand dollars per annum, and one deputy at one thousand and two hundred dollars per annum; *he shall have charge of the jail of said county and of all prisoners confined therein; he shall be paid seventy-five cents per day for the keeping and maintenance of said prisoners;* the same shall be submitted to the board of county commissioners at least once in each month, and before being paid shall be audited and allowed by said board, and shall be paid immediately upon allowance: *Provided*, that no sheriff shall be charged rent for any county building occupied by him as a residence.

Argument for Plaintiff in Error.

He shall receive fifteen cents per mile for each mile actually traveled in the discharge of his official duty; for executing judgment in capital cases he shall receive the sum of one hundred dollars, covering all expenses for himself and deputies." Session Laws, 1877, page 110.

By the first section of the act last named it was declared that the salaries and allowances therein provided for should be in lieu of all fees now provided by law, as provided in an act regulating the fees of officers approved Dec. 10, 1869, which act here referred to fixed the pay for keeping prisoners at one dollar per day. Said act approved Dec. 15, 1877, took effect Jan. 1, 1878.

It is not pretended that any law of this Territory *expressly* provides for the payment of any compensation to the sheriff of a county to pay a jailer or deputy for taking care of the jail and the prisoners therein, but it is insisted that the sheriff can make himself the judge of the necessity which may in any given case exist for employing a jailer, and may employ such jailer and recover from the county the amount so paid. We deny the doctrine *in toto*, and assert, on the contrary, that as public officers are mere agents of the public, they have no powers except such as the public through the statutes have given them; and cannot establish an obligation against the public, unless some statute exists authorizing them to do so; and we insist that where officers have duties to perform under the law, they must perform them for such compensation as the law itself has provided, be that compensation much or little; that if an officer is paid by fees or salary, or by both fees and salary, he can only receive compensation as fixed by statute; that no fees are allowed upon an implication, and that if a duty is enjoined upon an officer for which no salary or fees are provided, he must perform the duty without compensation—or rather, the law considers in such a case that the compensation attached to certain services is sufficient for all services which the officer may be called on to render.

"Officers take their offices *cum onere*, and services required

Argument for Plaintiff in Error.

of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services."

"Where a statute gives a fee to the sheriff or other officer for the service of process, and there is nothing in any statute showing a different intention, no other or further fees can be charged, and the county board of supervisors has no authority to make extra allowance to the officer for such services." *Crocker v. The Supervisors of Brown County*, 35 Wis., 284; *Hartwell v. The Supervisors of Waukesha County*, 43 Wis., 311; *Crassen v. Waco County*, 6 Oregon., 215; *Dillon on Municipal Corporations*, secs. 172-3; *Debolt v. Trustees, &c.*, 7 Ohio S., 237; *Carroll v. St. Louis*, 12 Missouri, 444, 288; *Ex-parte Minier*, 2 Hill, 411; *Board of County Com. v. Blake*, 21 Ind., 32; *Grabb v. Louisa County*, 40 Iowa, 314; *Atchison County v. Tomlinson*, 9 Kan., 167; *Republic County v. Kindt*, 16 Kan., 157.

The second exception in the record (p. 29, lines 1 to 8,) involves the same question already considered, it being an objection to any evidence being received on the ground that no cause of action was stated in the petition.

The next exception is found on pp. 34, 35 of the record, from which it appears that the plaintiff was asked this question: "State whether or not, in your opinion, Mr. Johnson, it was possible to keep those people confined there without engaging an extra person—from your own experience and knowledge." The defendant objected to this question on the grounds that it was incompetent, immaterial and irrelevant, which objection was overruled and exception taken, (lines 20 to 28, p. 34, and lines 1 to 19, p. 35,) and the witness answered in the negative. This evidence was immaterial for reasons already considered under another head, and was incompetent because it called for the opinion of the witness instead of the facts. The case was not one coming within the rules as to the admission of evidence of the opinion of experts. 1 Greenleaf on Evidence, sec. 440.

During the trial of the case the defendant offered in evi-

Argument for Plaintiff in Error.

dence the report of the Grand Jury of said county for the October term of the district court, in the year 1878, to which objection was made by counsel for plaintiff, and which objection was sustained by the court and an exception taken by defendant. (Record, pp. 78, 79, 80.) This was relevant and proper evidence as bearing upon the question of the duty of the County Commissioners to repair the jail in question, under the act before referred to. See Compiled Laws, p. 380, sec. 2.

Upon the trial of the case the court, at the request of the plaintiff, gave the following charge to the jury, to which the defendant objected and excepted :

"It is the duty of the county commissioners to furnish the sheriff a safe, secure and well constructed jail for the safe keeping of prisoners, and if you find from the evidence that the jail was in an unsafe, insecure and defective condition during the time specified, then the plaintiff was bound to use all lawful means necessary to keep the prisoners, and he is entitled to recover any amount he necessarily expended for the purpose." This instruction involves substantially the same question considered under the first assignment of error.

The court also instructed the jury upon the request of the plaintiff as follows, to which the defendant objected and excepted :

"The salary allowed by law to the sheriff is for his own personal services, and he is not obliged by law to pay any part of it towards defraying county expenses." This instruction is subject to the criticism already made under the last point, and is erroneous in another respect. Under this instruction if a sheriff should perform any service by deputy, other than the single deputy, who is paid \$1,200 per annum, he would not be bound to pay that deputy from his own salary. That this was clearly error will be perceived upon an examination of the several provisions of the statute bearing on the subject. See Session Laws, 1877, p. 110 ; Compiled Laws, pp. 342-3, 212, 213.

Argument for Defendant in Error.

The court erred, as we claim, in overruling the plaintiff's motion for a new trial, because of the errors already enumerated, and for the further reason that the verdict was not sustained by sufficient evidence. The jury rendered a verdict for \$270. The charge made by plaintiff against the county, was for the services of jailer for the months of January, February and March, 1879, at \$90 per month, but according to the plaintiff's own testimony, the jailor was not employed until the 12th day of January, 1879. The verdict was, therefore, excessive to the amount of \$36. The evidence also clearly failed to show any authority from the board of commissioners of Sweetwater County to employ a jailer and bind the county therefor.

M. C. Brown, for defendant in error.

The only question raised by the record, to which I desire to call the attention of the court, is this, viz: Is the sheriff of Sweetwater county entitled to pay from the plaintiff in error for the services of persons employed by him in the necessary discharge of his duties as sheriff, to perform unusual services, required by an emergency, and that are necessary in the due administration of the law? If yes, then there is no error in the record; if no, there is. Whether there is or is not error depends chiefly upon a construction of the statute of the territory. As bearing upon the question at issue see: Session Laws, page 110; chapter 66 Compiled Laws, title, jails; Compiled Laws, page 212, secs. 4 and 5; also 342, 343, 346, secs. 2, 3 and 12.

When statutes, by express provision, repeal all others inconsistent with them, such clauses do not repeal acts not inconsistent, though relating to the same matter. See Bishop on Statutory Crimes, secs. 152 and 126; *People v. Dunck*, 20 Cal., 94; *Lewis v. Stout*, 22 Wis., 225. Repeal takes place to the extent of repugnances only, and repeals by implication are not favored by the courts. See Bishop's Stat. Crimes, sec. 153 to 156 inclusive.

Opinion of the Court—Sener, C. J.

It will be seen that, according to Mr. Bishop, the great weight of authority in this country holds to this rule, as to repeal of statute, viz: The subsequent statute repeals the former, on *the same subject*, to the extent of the necessary conflict, and no further. In this case, fees are the subject of one statute, and salary, the other, not being on the same subject, there is no repeal by implication. Bishop's Stat. Crimes, sec. 165; Abbott's Law Dict., pages 256 and 484; *Kilgore v. People*, 76th Ill., 548; *Jefferson Co. v. Johnson*, 64th Ill., 149. It may be that there is no repeal of the old statute by the new, because, without, there may be two measures of payment for officers; but clearly section 12, page 346, of Compiled Laws, is not repealed. This being true, then when the sheriff is required to perform some unusual and necessary service, or where an emergency arises, and he is compelled to employ, for the public good, additional assistance and aid, he is entitled, under section 12, to a reasonable compensation from the county.

SENER, C. J. In the month of May, 1879, W. A. Johnson, who was then the sheriff of Sweetwater county in this territory, presented to the county commissioners of Sweetwater county, a claim against said county in the words and figures following to wit:

“The county of Sweetwater, Wyo. Ter., Dr., to W. A. Johnson, sheriff in and for Sweetwater county, Wyoming Territory, to services of Frank Shulter, as jailer, for the months of January, February and March, 1879, at \$90 per month, \$270.”

The county commissioners of said county disallowed said claim in whole, and thereupon the said W. A. Johnson in pursuance of secs. 17 and 18 of chapter 28 of the Compiled Laws of Wyoming, page 205, edition of 1876, appealed from the decision of said board to the district court of said county and filed a paper in the nature of a petition setting out his claim and the reason for its allowance by the court. The defendant, the county of Sweetwater, filed a demurrer

Opinion of the Court—Sener, C. J.

to said paper in the nature of a petition, on the ground that the paper or petition did not state facts sufficient to constitute a cause of action. The court below overruled this demurrer and the defendant excepted. Then followed an answer denying all the allegations in the petition; a trial by jury was had and a verdict against the county was rendered for the sum of \$270.

Various exceptions were taken during the trial, but in my view of the case, it will be unnecessary to notice or pass upon them.

The first question presented by the transcript before us, and the first one to be decided was, did the court below err in overruling the defendant's demurrer? The defendant below, the plaintiff in error here, by demurring admitted all the facts as stated in the paper filed by the plaintiff below setting up his claim, but prayed the judgment of the court then and there if they constituted a cause of action in law for which the defendant there, the plaintiff in error here, was liable by verdict and judgment. The defendant in error here, and the plaintiff below by his counsel in argument here, though arguing with much ability the effect and scope of several acts of the legislature touching county officers, rested his right to have the demurrer overruled and so to be allowed to pave the way to sustain the judgment of the court below upon sec. 12, chap. 49 of the Compiled Laws of Wyoming, page 346, edition of 1876. The learned counsel for the defendant below, the plaintiff in error here, claimed that this section was repealed. Without deciding this affirmatively or negatively, let us consider for all the purposes of this case that sec. 12 as before described, of chap. 49, is operative and in existence; that it is a valid statute. It was the only one upon which the defendant in error really relied as sustaining his theory and as establishing his judgment in the court below.

That statute is in these words, "That for any services rendered by any officer wherein no fees are allowed by this act nor any other act or provision of law, such officers shall be allowed a reasonable compensation therefor."

Opinion of the Court—Sener, C. J.

It seems to me that the simple application of this statute to Johnson's claim must determine whether the demurrer was or was not rightly interposed in the court below. Johnson's claim was not for a service rendered by himself as such officer, for which he demanded compensation; but it was a claim in his name for services rendered, doubtless at his, Johnson's request, by another, to wit: one Frank Shulter, as jailer, for the months of January, February and March, 1879. The statute, conceding it to be operative, provides a reasonable compensation to any officer for service by such officer. The compensation is allowed such officer for services he may render; not services for himself by another. Applying the statute just as written, we find that Johnson presented to the county commissioners, and claimed from the county, no compensation for services rendered by himself; but his claim was for services rendered by another.

These being the undisputed facts, upon the condition of the law as by Johnson relied on, to wit: as stated in sec. 12 of the 49th chapter of the Code, I think there was no such sufficient statement of facts in the paper answering to the petition, as raised in Johnson's favor a legal claim for compensation in this proceeding against the county of Sweetwater, as ought to have been sent to the jury for allowance, or in any event, allowed; but that the court below ought to have sustained the defendant's demurrer there and then.

Wherefore I am of opinion that the judgment of the court below be reversed, and the case dismissed.

Judgment reversed.

PECK, J.

The defendant in error sued the plaintiff in error for two hundred and seventy dollars, as so much money necessarily paid out by him as the sheriff of Sweetwater county, in payment of the services of one Shutler, as an extra jailer or guard to the prisoners, who were under the plaintiffs' care,

Opinion of the Court—Peck, J.

and which service he was compelled to hire, in consequence of the neglect of the commissioners to furnish a properly secure jail for the keeping of the prisoners. This is the claim in substance and effect, as declared upon: and the suit is an ordinary action for money paid, laid out and expended for the county at the implied request in law of the board. The latter demurred to the petition as not containing facts sufficient to constitute a cause of action: the demurrer was overruled and an exception therefor reserved by the defendant. The general denial was then filed, and on the trial of the issue, thus raised, the defendant objected to the introduction of evidence in support of the petition on the ground that it alleged no cause of action; the objection was overruled, exception taken therefor by the defendant, and has been duly preserved; the evidence, objected to, was introduced; and a verdict obtained, and a judgment entered thereon for the plaintiff below. He endeavors to sustain his action upon section twelve of the act of December 10th, 1869, entitled, "An act regulating the fees of officers," at page 342 of the compilation; and it must be sustained by that section, if at all. Whether the section was repealed by the act of December 15, 1877, entitled "An act to establish the salaries of the county officers of Sweetwater County," at page 110 of the laws of 1877, is a question: but, if it was left in force by the last named statute, and the court from which this appeal comes, had jurisdiction of the suit I should not hesitate to hold that the judgment, rendered below, should be reversed, and the case dismissed on the ground of error in entertaining the action, as it was entertained, under said section 12: because though the section embraces sheriffs, it reads "That for any services, rendered by any officer, wherein no fees are allowed by this act nor any other act or provision of law, such officer shall be allowed a reasonable compensation;" and justifies no claim or suit other than for work and labor.

But the record shows that that court had no jurisdiction; and our duty is to act upon the defect, notwithstanding

Opinion of the Court—Peck, J.

both parties acquiesce in the jurisdiction as assumed. The writ of error is addressed to "the judge of the district court of the second judicial district within and for the county of Sweetwater:" the record is certified by J. W. Meldrum as clerk of that court as sitting there; and under a seal, which is inscribed as the seal of that court for that county; and the record states that all the proceedings in the lower court, commencing with an appeal from a disallowance by the board of the claim in suit were conducted in it as the second district court sitting there, and by the second district judge. The second district court could sit in that county only under the act of December 15, 1877, entitled, "An act to provide for the organization of Crook and Pease Counties, and to provide for holding courts therein"—page 84 of the laws of 1877. The statute assumes to provide for annexing to the second district the counties of Uinta and Sweetwater, which at its passage constituted the third district; and for the organization of Crook and Pease counties into a new third district; the act would not take effect to extend the second district over Uinta and Sweetwater counties, or either of them until the new third district had been organized; and it has not been organized, nor could it be organized, because the act is void. In either view therefore the exercise by the second judicial district court of jurisdiction in this case was a nullity. My reasons for this result as to jurisdiction are particularly stated in my opinion filed in the case of H. Garbanati against Beckwith & Co, which was argued at a former day of this term. I also refer to that opinion as showing that the judge who held the court below was incompetent to hold it, and that the second judicial district court could not be held in Sweetwater county.

The judgment rendered below should be reversed, and the case dismissed with costs to the plaintiff in error.

BLAIR, J. dissenting.

Statement of Facts.

GARBANATI v. WILLIAM HINTON ET AL.

NEW TRIAL.—The court will not set aside a verdict and grant a new trial upon the ground that the verdict was not sustained by sufficient evidence unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of evidence to such an extent as to show that the verdict was the result of improper motives.

ERROR to the District Court of Uinta County.

This action was brought by Henry Garbanati against William Hinton and Michael Quealey, late co-partners, before C. E. Castle, a justice of the peace in and for said county of Uinta, to recover the sum of \$55, alleged to be due for legal services rendered by the plaintiff for the defendants at their special instance and request.

The action was commenced on the 21st day of March, 1878, and on the 29th day of March, 1878, the summons was returned as served on William Hinton, one of the defendants, said Michael Quealey not found in the county. On the same day the case was tried, Hinton having duly appeared and pleaded the general denial, and was after trial dismissed, judgment having been rendered against the plaintiff for costs. Garbanati then appealed to the district court, where the case was tried on the 15th of July, 1879. Trial by jury having been waived, it was submitted to the court. On the succeeding day, July 16, 1879, the findings of the court were filed, being in favor of the defendant, Hinton, and against the plaintiff. A motion to set aside the finding of the court and for a new trial was then made by the plaintiff and overruled. Judgment being rendered against the plaintiff for costs.

H. Garbanati, for plaintiff in error.

W. G. Tonn, for defendants in error.

Opinion of the Court—Blair, J.

BLAIR, J. This suit was brought in a justice court by the plaintiff in error, against the defendants, and judgment having been rendered in favor of the defendants, the plaintiff in error took an appeal to the district court of Uinta county.

The parties waiving the right of trial by jury, submitted all questions, both law and fact, to the court. The court, after hearing all the evidence offered by either party, rendered a judgment for the defendants. The plaintiff in error then sued out a writ of error, and brought the case here for review, and assigns the following errors:

First.—That the findings of the court are not sustained by sufficient evidence.

Second.—That the findings of the court are contrary to law.

Third.—That the court erred in finding for the defendants, instead of for the plaintiff, as by the law of the land it ought to have found.

It will be seen that the first error assigned covered the whole ground of complaint, and when that is disposed of the others need not be considered.

In the case of the *Wyoming National Bank v. Dayton*, reported in the first volume of Wyoming Reports, the court says, in regard to granting a new trial on the ground that the verdict of the jury was not sustained by sufficient evidence, that the court will not set aside a verdict and grant a new trial upon the ground that the verdict is not sustained by sufficient evidence, unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of the evidence, to such an extent as to show that the verdict was the result of improper motives. Again, in the case of the *Hilliard Flume and Lumber Co. v. Woods*, reported in the first volume of Reports, Peck, Justice, who delivered the opinion of the court in that case, in considering the same questions here presented, with a boldness and terseness which shows that he

Opinion of the Court—Peck, J., dissenting.

was master of the law in that regard, says, that when an appellate court is empowered to revise upon the facts it can never reverse them simply because, from the evidence submitted to it, it would have arrived at a different conclusion, and can only reverse when the verdict, or if the trial was by the court without a jury, the findings below were so clearly against the weight of evidence that no mind of fair intelligence, faithfully exercised, can be reasonably supposed to have arrived at the result which is complained of; or to state in a different form, but arriving at the same idea, where the evidence to such a mind so exercised tends to an opposite conclusion.

Recognizing the rule here laid down as the true rule, in regard to granting new trials for the cause assigned, we have carefully examined the evidence in this case, and are forced to the conclusion that there was no error in the judgment of the court below.

Judgment affirmed.

PECK, J., dissenting.

The plaintiff sued the defendant in a justice's court in Uinta county; from a judgment there rendered against him, entered an appeal in the second judicial district court as sitting in and for that county; and wherein judgment was rendered against him on the merits; from which judgment he comes here on error. It appears in terms that the trial was had before, and the judgment rendered by the Hon. Jacob B. Blair; that a motion for a new trial was heard, and denied, and that a bill of exceptions was allowed by him; he was the judge of the second judicial district; and presumably the judge in all the proceedings, which transpired in the case in the district court. No allegation of error was made below, or has been made here, nor has objection been taken here in argument for want of jurisdiction in the

Syllabus.

second judicial district court, or for want of competency in that judge as judge. The majority of this court has affirmed the judgment after hearing upon the merits. For the reasons, contained in the dissenting opinion, which I have filed in the case of this plaintiff against Beckwith & Co., decided by the court at this term the second judicial district court had no jurisdiction in Uinta county, and that judge was incompetent, as judge, to sit in the proceedings below, or in the case here. Consequently the proceedings of the district court, and the action of the majority of this court in the case were void. Mr. Justice Blair should not have sat here; and the residue of this court should have reversed the judgment that was rendered below, and dismissed the action.

McCANN v. THE UNITED STATES OF AMERICA.

INDICTMENT: EMBEZZLEMENT.—An indictment must set forth facts sufficient to constitute the given offence, so as to notify the accused of the issue he has to meet; and unless it does this, it charges nothing on which an issue can be raised by plea of not guilty; this rule is founded on a principle that inheres in all criminal cases. Hence an indictment for embezzlement must set forth the actual fiduciary relation and its breach.

IDEM.—A statute, in creating a crime, defines it; and may employ for the purpose a proposition of fact, or one of law only; all the ingredients of fact that are elemental to the definition, must be alleged in the indictment, so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the act, that will do; if not, other allegations must be used; hence the rule to follow the words, is safe only when its effect will be to follow the act.

IDEM.—A count in an indictment, which alleges that by one and the same act the defendant embezzled and stole the property; by one act com-

Statement of Facts.

mitted upon it two dissimilar crimes, the commission of one of which negates the possibility of the commission of the other, nullifies itself and charges nothing; tenders no issue, and will not support a verdict of guilty.

EVIDENCE: INSTRUCTIONS.—Where the defendant was being tried for embezzlement, and while testifying as a witness in his own behalf, was asked, if he had made any arrangement with the agent of the government in respect to the sugar in question, and having answered in the affirmative, he was then asked the following question: "You may now state what that arrangement was"; objection being made, the court refused to let the witness answer. At the conclusion of the testimony the defendant requested the court to give the following instructions to the jury: "*Ninth*—That if the defendant took the property described in the indictment, under an honest claim of right to do so, and under an honest belief that he had authority to take the same and dispose of it, then the act of taking would lack the felonious intent necessary to constitute the crime charged, and it is for the jury to say, in view of all the facts and circumstances in evidence, what the intention of the defendant was." "*Tenth*—That if the defendant took the property described in the indictment, and converted the same to his own use under an agreement with the officers of the United States that he should do so, and return the like amount of property to the United States; or if he took such property with an honest belief on his part that he had such agreement and authority, then he cannot be found guilty as charged in the indictment." Both of which instructions were refused. *Held*, That the district court erred in rejecting the answer of the defendant in reference to the arrangement made with the agent of the government, and also in refusing instructions nine and ten, requested by the defendant, for the reason that if he converted the property, under an agreement with the agent of the government to do so, and with an honest belief on his part that he had authority, whether he had or not as a matter of fact, he could not be guilty of embezzlement. And whether or not these facts existed was a question for the jury.

ERROR to the District Court of Laramie County.

The plaintiff in error was indicted in the district court on the 16th day of November A. D. 1877; the indictment contained two counts and was in the following language:

"UNITED STATES OF AMERICA, }
 TERRITORY OF WYOMING, } ss.
 1ST JUDICIAL DISTRICT, }

At a term of the district court for the first judicial district of the territory of Wyoming, exercising the jurisdic-

Statement of Facts.

tion of the circuit and district courts of the United States, begun and held at Cheyenne, in the first judicial district of the territory of Wyoming aforesaid, upon the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, the grand jurors of the United States of America, good and lawful men, summoned from the body of said district, and duly impannelled, sworn and charged to inquire in and for the body of said district of all offenses against the laws of the United States, committed within said district, in and by the authority of the United States of America, upon their respective oaths do present and find, that, on the tenth day of November, in the year of our Lord one thousand eight hundred and seventy-six, Dwight J. McCann, yeoman, late of the district aforesaid, at and within the district aforesaid, twenty thousand pounds of sugar of the value of ten cents per pound, of the goods, chattels and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal and purloin, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America.

And the jurors aforesaid, upon their respective oaths aforesaid, do further present and find that said Dwight J. McCann, on the day and year aforesaid, at the place aforesaid, twenty thousand pounds of sugar of the value of ten cents per pound of the goods and chattels and property of the United States of America, then and there being found, then and there feloniously did take, steal and carry away, contrary to the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America."

The defendant filed a demurrer expressing three causes or grounds therefor, to-wit:

1. That the indictment and the matters therein contained, in manner and form as the same were stated, were not sufficient in law, etc.

Argument for Plaintiff in Error.

2. That the first count of said indictment and the matters therein contained, in manner and form as the same were therein stated, were not sufficient in law, etc.

3. That the said second count of said indictment was no part thereof and that said second count, and the matters therein contained, in manner and form as the same were therein stated, were not sufficient in law, etc.

The act of congress under which this indictment was drawn is as follows:

"That any person who shall embezzle, steal or purloin any money, goods, chattels, records, or property of the United States shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States, in the district wherein said offense may have been committed, or into which he shall carry, or have in possession of said property so embezzled, stolen or purloined, shall be punished therefor by imprisonment, at hard labor, in the penitentiary, not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted." Statutes of the United States, 1874, '75; chap. 144, page 479, sec 1.

The demurrer was overruled; the defendant then pleaded not guilty to the indictment, and the case was tried at the November term 1878, resulting in a verdict of guilty.

W. W. Corlett, for plaintiff in error.

The defendant must have committed the acts named in the statute and he must have been convicted thereof in the district or circuit court of the United States in the district wherein the offence was committed, before any court has any authority to inflict punishment. The conviction of the defendant before a district or circuit court of the United States is just as much a condition precedent to the right to impose a penalty as is the commis-

Argument for Plaintiff in Error.

sion of an embezzlement or larceny. That fact does not make it such a court. The supreme court of the United States has in several cases decided that a territorial court is not either a district or circuit court of the United States. *Clinton v. Englebrecht*, 13 Wallace, 434; *American Insurance Co. v. Cauter*, 1 Peters, 545; *Benner v. Porter*, 9 Howard, 235; *Reynolds v. The United States*, 8 Otto, 145.

A fundamental rule in the construction of criminal statutes is, that they are to be strictly construed in favor of the defendant. 1 Bishop Crim. Law, secs. 114, 115, 133. This rule is further enforced and illustrated by that subordinate rule of interpretation of a criminal statute, which is expressed in these words and which is enforced by all courts and asserted by all standard text books upon this branch of the law, viz.: "No case is to be brought by construction within the statute while it falls not within all its words." 1 Bishop on Criminal Law, sec. 134, 5, 139; *Hall v. The State*, 20 Ohio, 7; *United States v. An Open Boat*, 5 Mason, 120; *Rex v. Ellis*, 5 B. & C., 395; *United States v. Nott*, 1 McLean, 499; *Commonwealth v. Gee*, 6 Cush., 174; *United States v. Hiler*, 1 Morris, 330.

Embezzlement is the misappropriation of money or other things by servants in whom a trust is reposed, where by reason of the trust or other circumstances the act does not amount to larceny. 1 Bishop on Criminal Law, sec. 419. 2 Bishop on Criminal Law, secs. 280-281.

No indictment for embezzlement is good which does not set out the trust relation, which is an indispensable ingredient of the offense, and a breach of the trust. Wharton's Precedents of Indictment and Pleas, pp. 205 to 211; Wharton's Precedents, etc., ed. 1871, pp. 460-469; Bishop on Statutory Crimes, sec. 418; Bishop on Statutory Crimes, sec. 381; *Commonwealth v. Smart*, 6 Gray, 16; Wharton's Criminal Law, sec. 372. The defendant in this case was neither a servant nor a public officer; he was merely a contractor with the government, and hence there was no embezzlement—none was charged in the indictment or

Argument for Plaintiff in Error.

proved on the trial. Wharton's Criminal Law, secs. 1935, 1936, 1937, 1940.

Evidence of embezzlement was not admissible under the first count in the indictment. 2 Bishop on Criminal Procedure, secs. 282, 3, 4; *Commonwealth v. Simpson*, 9 Metcalf, 138-142. Neither is the first count in the indictment sufficient to charge a larceny. It does not contain the words, "did take, steal and carry away," always necessary in a charge of larceny, Wharton's Precedents, pp. 190, 191, note (d); Wharton's Precedents, 2 vol. ed. 1871, p. 417, note (d).

As to what constitutes the crime of embezzlement and is necessary in proof to sustain an indictment, see *Regina v. Creed*, 47 Eng. C. L. 63; *Rex v. Jones*, 32 Eng. C. L. 897; *Regina v. Norman*, 41 Eng. C. L. 274. The description of the property alleged to have been embezzled and stolen was bad. (This objection applies to both counts of the indictment.) Wharton's Criminal Law, sec. 354 to 362. So, too, the allegation of the value of the property is insufficient in both counts of the indictment. Wharton's Criminal Law, secs. 354-362. Horton's Criminal Law, secs. 354-362.

The defendant offered to prove an arrangement with the Commissioner of Indian Affairs by which the defendant might dispose of the sugar and supply an equal amount the following spring. Was this evidence competent in any view of the case? We claim that it was, and that the court committed a grievous error in ruling it out. The evidence was ruled out on the ground that its effect would be to vary a written contract by parol evidence. But if this had been a mere civil action, it being a new and distinct agreement upon a new consideration, being in addition to and beyond the original written contract, and because as to these particular goods it would show that the written agreement was waived or abandoned, the evidence ought to have been received. Greenleaf on Evidence, secs. 303, 304; 2 Parsons on Contracts, 554-55; *Monroe v. Perkins*, 9 Pickering, 298.

Argument for Plaintiff in Error.

If the defendant, instead of denying the appropriation of property, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offense in taking and keeping it is no embezzlement. Wharton's Criminal Law, sec. 1940; 2 Bishop on Criminal Procedure, sec. 298; 1 Bishop on Criminal Law, sec. 240; *Regina v. Norman*, 41 E. C. Law, 274; *R. v. Reed*, 1 Carrington & M., 306; 2 Russell on Crimes, 9; *State v. Bennett*, 17 Missouri, 379; *State v. Witt*, 9 Missouri, 673; *State v. Conway*, 18 Missouri, 321; Roscoe's Criminal Ev., 592; 2 Archbold P. & P., 387; 2 East P. C., 554, 662, 659, 694; Greenleaf on Evidence, sec. 51; *Wilson v. Barkalow*, 11 Ohio, 470.

The court, at the request of the prosecution, charged the jury as follows:

"If a bailee who has charge of the goods or property of another, with intent to steal, breaks bulk and removes the property from the original package, the act of breaking bulk for a purpose inconsistent with the object of the bailment, and for the further purpose of feloniously converting the same to his own use, constitutes in itself the crime of larceny."

The instruction complained of was erroneous, because any breaking of bulk by the defendant occurred *after* the defendant had made a conversion of the property—the whole of it—by assuming entire and exclusive dominion over it, as his own. If a bailee, before the termination of the bailment, converts to his own use the whole of a quantity of goods entrusted to him, as bailee, he is not guilty of larceny. If, after such conversion of an entire lot of goods, he breaks bulk, or does anything else with the goods, such breaking of bulk, or other act in respect to the property, does not constitute larceny. In this, we think all the authorities are agreed. Wharton's Criminal Law, secs. 1861, 1862, 1863, 1864, 1866; *Rex v. Leigh*, 2 East P. C., 694. Wharton's Criminal Law, 1770; 2 Bishop Criminal Procedure, 298; *Regina v. Norman*, 41 E. C. Law, 274;

Argument for Plaintiff in Error.

2 Russell on Crimes, 9; *Washington Ins. Co. v. Merchant's Ins. Co.*, 5 O. S., sec. 450.

If an erroneous instruction is given to the jury, the case must be reversed on error, unless the court can clearly see that it could not possibly have done any harm. The presumption is, that improper instructions as to the law work mischief. In this case it would be impossible for the court to see that no harm was done, because it cannot know how the minds of the jurors were affected by the instruction upon the vital question in the case, namely, did the defendant take the goods with a felonious purpose and mind? *Lowe v. Lehman*, 15 Ohio State, 179; *Pendleton Street R. R. v. Stallman*, 22 Ohio S., 1; also see authorities under point 8.

To constitute larceny, there must be an intent to steal, which involves the knowledge that the property belongs not to the taker; yet if all the facts concerning the title are known to the accused, and so the question is one merely of law whether the property is his or not, still he may show that he honestly believed it his through a misapprehension of the law. 1 Bishop on Criminal Law, sec. 240; *Rex v. Hall*, 3 Car. & P., 409; *Reg. v. Reed*, Car. & M., 306; *Com. v. Doane*, 1 Cush., 5; *The State v. Hames*, 17 Mo., 379; Wharton's Criminal Law, secs. 1866-1940; 2 Bishop on Criminal Law, sec. 762; 4 Abbott's Digest, sec. 153; 11 Johnson, 150; *Vanderhayden v. Young*, 11 Johns., 150.

There is considerable controversy in the cases upon the question as to whether to maintain a charge of larceny, it is necessary to show that the taking of the property was done *lucri causa*; but it is a point beyond all controversy, that the taking must be *either* for the purpose of some gain to the defendant, *or* for the purpose of depriving the owner (general or special) of his entire ownership in the property. 2 Bishop on Criminal Law, sec. 755; *Thompson v. People*, 4 Neb., 524; Wharton's Criminal Law, sec. 1751; *R. v. Holloway*, 2 Car. & Kir., 945; 2 Russell on Crimes, p. 93.

The court, while giving Blackstone's definition of lar-

Argument for Plaintiff in Error.

larceny, entirely misapprehended and misconstrued the general terms employed in the definition; for Blackstone, after giving the definition, further observes: "The taking and carrying away must be *felonious*; that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa*." 2 Bishop on Criminal Law, sec. 756; 4 Bl. Com., 232. The term *lucri causa* means *for gain*, so that while the court gave to the jury Blackstone's definition of larceny, it afterwards in explaining it, emasculated it, by giving it a construction and meaning which Blackstone distinctly repudiates. But waiving all questions as to whether to constitute larceny the taking must be *lucri causa*, it is conceded by all authority on the subject that the taking must be for the purpose of depriving the owner of all his ownership in the property. 2 Bishop Criminal Law, sec. 755.

The right to controvert the showing made by a defendant for a new trial, on the ground of newly discovered evidence, has never been extended further than to permit the prosecution to show that the witnesses from whom the new evidence is to be obtained are not worthy of belief, and even this right seems to have been confined to civil cases. 3 Wharton's Criminal Law, sec. 3164; *Williams v. Baldwin*, 18 Johns, 489; *Parker v. Hardy*, 24 Pick, 246.

It is manifest from an examination of the indictment that both counts therein charged, and were intended to charge, the same offense. "The rule is clear that when two counts, setting out the same offense, occur, judgment will be arrested." Wharton's Criminal Law, vol. 1, sec. 426; *Campbell v. R.*, 11 Ad. & El. N. S., 800; *Nelson v. The People*, 5 Parker's C. R., 39.

The joining of two or more offenses in one count is never permitted, and as there is an attempt in this indictment to charge both larceny and embezzlement, in the first count, that count is bad, and the verdict being a general one, judgment should be arrested. *State v. Howe*, 1 Richardson, (S. C.) 260; *Reed v. The People*, 1 Parker's C. C., 481; *U. S. v. Sharp*, 1 Peter's C. C., 131; *Com. v. Symonds*, 2 Mass., 163.

Argument for Defendant in Error.

Words in an indictment, which may have been grounds for the jury in finding their verdict, cannot be rejected as surplusage to support a conviction. *Com. v. Atwood*, 11 Mass., 93. The verdict being a general one in this case, and there being two counts in the indictment charging the same offense, by the American authorities a motion in arrest of judgment will lie. 1 Bishop on Crim. Pro., sec. 443; *Com. v. Symonds*, 2 Mass., 163; *State v. Nelson*, 8 N. H., 163; *State v. Fowler*, 8 Foster, (N. H.) 184-194; Wharton's Criminal Law, secs. 414, 282.

M. C. Brown, for defendant in error.

The several counts of the indictment are sufficient in law Bishop's Stat. Crimes, secs. 380, 381.

The words embezzle, steal and purloin, each partake somewhat of the meaning of the other, and each describes a manner in which the substantive offense may be committed. Abbott's Law Dict., vol. 1, page 421; *Sawin v. Martin*, 11 Allen, 439; *United States v. Conant*, Reporter No. 2, page 36; Horton's Precedents, vol. 2, sec. 1101; *Berry v. United States*, 2 Col. R., 186.

Where the value of the thing stolen or embezzled enters in any degree into the punishment, value must be alleged, but if the statute makes the stealing or embezzling a felony, without reference to value, then value need not be alleged. Bishop Crim. Law, vol. 1, secs. 340, 341 and 567; *Lope v. The State*, 20 Texas, 780; *Shepard v. The State*, 42 Ala., 431; *The State v. Daniels*, 32 Missouri, 558.

The second count in the indictment is or may be treated as surplusage; the word steal in the first count charging all that is charged in second count of indictment.

The court has jurisdiction of the offense described by the statute. The statute, properly construed, does not take away or narrow the jurisdiction given by the general law to territorial courts, sitting as district courts, &c., of the United States, but simply fixes the *locus* of trial; and the

Argument for Defendant in Error.

language of statutes naming particular courts is used in a general sense, and covers territorial courts. *United States v. Haskins*, 3 Sawyer, 262, 271; *Berry v. United States*, 2 Col. R., 186.

The rulings of the court on evidence are not error, and even if wrong, work no injury to defendant. If there is error in the instructions, they are in favor of defendant, and he cannot complain. See Russell on Crimes, vol. 2, 8th ed., American par. 59, top 59 page. The principle involved being thus, to wit: The determination of the priority of contract, or bailment by the tortuous act of the bailee. See Russell as above; see also same, page 57 and 59; Wharton's Criminal Law, vol. 2, secs. 1862, 1863, *et seq.*; *Rex v. Maddox*, R. and R., 92; 1 Hale, 504; *Carr v. Brown*, 4 Mass.; *Dunn v. Baldwin*, 8 Mass., 580; see also *Nichols v. People*, 17 N. Y., (3 E. D. Smith), 114.

The instructions of the court are excepted to as a whole, the exception being general, and if there is any part thereof that states the law correctly, then the exception is not well taken. See *Simonton v. Kelly*, 1st Montana, 363; *Strader v. White*, 2 Nebraska, 360; *Dodge v. The People*, 4 id., 231; *Smith v. State*, 4 id., 288.

And again, if there is error in ruling on evidence and instructions, the exceptions are not preserved by a motion for new trial filed in proper time, and a motion to dismiss the writ of error for this reason should be sustained; at least the court will not consider the bill of exceptions in this behalf, the motion for a new trial not having been filed in time, and no showing made for delay.

The motion for new trial, based upon newly discovered evidence, does not come within the rule, and was properly overruled. *Yawez v. State*, 6 Tex. Crim. Rep., 429; *Hutchinson v. State*, id., 468; *Darnell v. State*, id., 482.

Motion in arrest must be filed within three days after verdict. Compiled Laws of Wyo., page 163, sec. 187. This was not done, and for this reason the court's ruling in refusing the same was not error. *Valentine v. State*, 6

Opinion of the Court—Peck, J.

Tex. Crim. Rep., 439. The whole case considered shows a deliberate fraud upon the government, a crime deliberately planned and perpetrated, and should be rigorously punished, and no reversal of judgment should be tolerated upon slight technicalities, wherein the plaintiff in error is in no wise injured.

PECK, J. The plaintiff in error was convicted in the first district court under section one of the Federal statute of March 3d, 1875, entitled, "An act to punish certain larcenies, and the receivers of stolen goods," which section is: "that any person, who shall embezzle, steal or purloin any money, goods, chattels, records or property of the United States, shall be deemed guilty of felony, and on conviction thereof, before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property, so embezzled, stolen or purloined, shall be punished therefor by imprisonment, at hard labor, in the penitentiary, not exceeding five years, or by a fine, not exceeding five thousand dollars, or both at the discretion of the court, before which he shall be convicted." He objects that that court had no jurisdiction over the case. If the record discloses the defect, the objection should prevail, the judgment be reversed, the case dismissed, and the plaintiff in error discharged. The section limits the jurisdiction over the offenses, which it designates, to the district and circuit courts of the United States. Is the first district court of the Territory either of those tribunals?

The organic act provides that there shall be a supreme court in the Territory; that the latter shall be divided into three judicial districts, and a district court held in each by a judge of the supreme court; that the supreme and district courts shall have chancery and common law jurisdiction, for the redress of all wrongs committed against the constitution and laws of the United States; that each of these district courts shall have the same jurisdiction in all cases

Opinion of the Court—Peck, J.

arising under that constitution and those laws, as is vested in the circuit and district courts of the United States; that writs of error, bills of exception and appeals shall lie from the final decisions of the district courts to the supreme court; and writs of error and appeals from the latter to the supreme court of the United States, when the amount in controversy exceeds one thousand dollars. Section 1910 of the first revision of the United States Statutes—the revision made at the first session of the forty-third congress—re-enacts and applies to this and other territories the provision that their district courts shall have the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and that writs of error and appeals may be had in those cases to the territorial supreme courts, as in other cases.

The Federal government provides and compensates the judges, clerks and marshals for the territorial district courts, and controls their tenures; requires the marshals to execute all processes issuing from those courts, when acting as circuit and district courts of the United States, or entertaining cases which arise under the constitution and laws of the government. Thus these territorial district **courts** are instituted by that government; are organized by it in respect to officers, jurisdictional area, jurisdiction of subject-matter—all this for the administration of its constitution and laws, for this purpose embodying the entire jurisdiction of its circuit and district courts in cases arising thereunder; their jurisdictional areas are styled judicial districts, and themselves district courts. Why are they not in substance, attribute and function, district courts of the United States in the sense of the act of March 3d, 1875? Two courts may be similar in jurisdiction of subject-matter, but dissimilar in style, laws, source, also in subject-matter. The organic act and the revision, by conferring upon the district courts of the Territory the above described jurisdiction of the district courts of the United

Opinion of the Court—Peck, J.

States, treat the two as constituting distinct classes; and recognizes the necessity of special legislation to clothe the former with any of the power of the latter.

In respect to source, both classes originate in the Federal government, but from entirely distinct powers or subordinate sources within that general source; and the style, laws and subject-matter of each are referrible only to its own special power and subordinate source. Hence in the legislative and judicial speech of that government the two classes have uniformly been treated as organically distinct. The third article of the constitution at section one provides that, "The judicial power of the United States shall be vested in a supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish;" whose judges shall hold their offices during good behavior; and at section second for the subject-matter of the jurisdiction of those courts. The circuit and district courts of the United States, so called, have always been limited to state area; and provided with judges, appointed to hold their offices during good behavior; they have been, and they could be created, organized and maintained only under this article. This alone disposes of the question; but the law upon the subject has been developed far beyond this point.

The first article at the eighth section authorizes the United States to carry on war, and the second article at the second section to make treaties; hence one article empowers it to acquire territory by conquest, the other to acquire it by compact; the fourth article at the third section authorizes congress to make all needful rules and regulations respecting the territories; and the eighth article at the first section clothes it with exclusive legislative power over the seat of government.

Whatever merit there may be in the proposition that all the parts of the constitution, which are in *pari materia*, are to be construed in connection, and as far as may be, in harmony; that the terms of the third article are equivalent to the declaration, that, "the judicial power of the United

Opinion of the Court—Peck, J.

States shall be vested *only* in one supreme court, and in such inferior courts," etc., that is, are equivalent to the declaration, that, "The *entire* judicial power of the United States shall be vested in one supreme court, and in such inferior courts," etc., and are therefore the sole repository in the constitution of judicial power; that congress can ordain and establish only inferior courts; that, as out of this repository congress has ordained and established the circuit and district courts of the United States and the court of claims out of it, under the eighth article and first section, the supreme court of the district of Columbia—and out of it may ordain and establish such other inferior courts as the exigencies of the Federal service shall require—so out of it alone can congress, under the sovereignty implied in the acquisition of territory by conquest and treaty, and that expressed in the authority to make needful rules and regulations concerning the Federal territory, ordain and establish courts for the territories; and though this construction of the third article would have given to it completeness of scope and efficiency, would have secured to the last mentioned courts judges holding their offices during good behavior, but subject to termination on the extinction of the courts, (as is the case with all life tenures in respect to the offices to which they are attached,) a result seemingly in accordance with the letter and spirit of the constitution, for its clearly apparent purpose was to render all judges of Federal appointment independent, and for a reason common to all; whatever merit there may be in the proposition; it is abstract, because it has been entirely concluded by the decisions of the supreme court of the United States.

In the *American Insurance Co.* and the *Ocean Insurance Co.* against *Cauter*, 1 Pet., 511, that court decided that the courts ordained and established under the third article, are constitutional, not legislative; can alone exercise the jurisdiction conferred by it; and are limited to the states;—that the territorial courts are legislative, not constitutional; ordained and established only out of the incidental sovereignty

acquired by conquest or treaty, or out of the power to make needful rules and regulations respecting the territories; can exercise no jurisdiction but what is derived from those two sources, and are limited to the territories. This doctrine remains in the court. Let us now pass to the latest expressions upon the subject.

In *Clinton et al.* against *Englebrecht*, 13 Wall., 434, the plaintiff below, defendant in error, sued Clinton and others in the third district court of Utah, to recover under a territorial statute a penalty for a trespass; the case was tried before a jury, which had been selected as under the judiciary act for juries for the circuit and district courts of the United States. In issuing the venire and selecting the jury the territorial court acted upon the theory, that it was an United States court of that class. The defendants below challenged the array, and excepted to a decision, overruling the challenge; the exception was the only question before the supreme court of the United States, was unanimously sustained, and the judgment reversed. In support of the panel the defendant in error claimed that the territorial jury statute was so defective, that no valid panel could be obtained under it, and therefore the judiciary act must apply; to which the court answered in effect, that the question was not whether the territorial law was adequate, but whether the Federal laws applied; for, if the latter did not apply, the array was void, though the former law was inadequate.

Explaining its conclusion, the court said that the territorial courts were only legislative, created under the clause of the Constitution which authorizes congress to make all needful rules and regulations respecting the territories; that there was no district court of the United States in Utah, consequently that the third district court, whose proceedings were under review, was not a district court of the United States; that the venire might be a process suitable for the exercise of its jurisdiction in cases arising under the constitution and laws of that government, when acting

as its circuit or district court, but that the selection of the jury must be made under the territorial law; and that that was especially true of a case arising, not under any act of Congress, but exclusively, like the case in the record, under the territorial law. The supreme court might have decided the case solely upon the ground that it arose exclusively under a territorial statute, and was, therefore, triable only on the territorial side of the court, whatever might be the status of its Federal side in respect to jurisdiction; and in deciding it also, upon the ulterior point as to what that status was, the purpose of the court seems to have been to bury doubt upon the subject.

In *Reynolds* against the *United States of America*, 8 Otto, 145, the plaintiff in error was indicted in the third district court of Utah for bigamy, under section 5352 of the U. S. Rev. Stat.; and plead in abatement that he was indicted by a jury of fifteen, provided under the territorial act; whereas he should have been presented, if at all, before a jury of not less than sixteen nor more than twenty-three, provided by section 808 of the U. S. Rev. Stat. in ch. 15, as to juries, and Tit. 13, as to the judiciary: the plea was overruled, and he was convicted. Though not so stated in terms in the report of the case, it is clear that the decision was on a general demurrer to the plea. The case went to the supreme court of the United States on the plea; and the decision overruling it, was there affirmed, and upon the ground, stated with unmistakable explicitness, that the section applied only to the circuit and district courts of the United States; and that they did not include the territorial courts, though they had, in cases arising under the constitution and laws of that government, the same jurisdiction that is vested in its circuit and district courts. That court decided the insurance cases against Cauter in 1878, and Clinton and others against Englebrecht in 1871, defining those courts to be a class exclusive of the territorial district courts; the statute of March 3, 1875, was passed in the light of those decisions, and must be construed as designating in accord-

Opinion of the Court—Peck, J.

ance with them the courts to which it commits the jurisdiction that it creates. In *Reynolds* against the United States of America, that court in 1878 re-affirmed the definition, and thus limited the act to the definition. This construction must be treated as final.

With the profound respect which is due from me to our appellate court, and the truthful candor which is incident to my office as a member of this court, I am constrained to say, that there is manifest error on the part of that court in this,—in saying that the territorial courts are not constitutional because they are legislative. These courts, the supreme court of the District of Columbia, the court of claims and the circuit and district courts of the United States are all legislative, because created by congress; but also constitutional, because created under the Constitution,—as constitutional as is the supreme court of the United States; it is created by, they under the Constitution; all have in it their origin; and all exist to perform duties, that it has devolved upon the Federal government.

This constitutional essence must exist in each, whether the power to create inferior courts, contemplated by the third article, and the power to create territorial courts, are separate or one. Congress can ordain and establish courts only by Federal authority, for Federal purposes, and subject to Federal control; and what it ordains and establishes must be constitutional, because legislative—legislative, because constitutional. Hence the proposition that the courts of the territories as legislative are not constitutional, is not only superfluous to the elucidation of, but in conflict with the result to which that court arrived, namely, that the third article did not embrace the territories.

As the first district court of this territory had no jurisdiction under the statute of March 3d, 1875, its judgment should be treated accordingly; but as the other members of this court hold that it had jurisdiction, it is necessary to determine whether its judgment shall be affirmed or reversed upon the merits.

Opinion of the Court—Peck, J.

The indictment consists of two counts: the first charges, "that on the 10th day of November in the year of our Lord one thousand eight hundred and seventy-six Dwight J. McCann, yeoman, late of the district aforesaid, at and within the district aforesaid, twenty thousand pounds of sugar, of the value of ten cents per pound, of the goods, chattels and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal and purloin, contrary to the forces of the act of congress, in such case made and provided," i. e.; the second charges "larceny in common form as to twenty thousand pounds of sugar of the value of ten cents per pound, the goods, chattels and property of the plaintiff below, and as committed within the district, and against the form of the act of congress, in such case made and provided." The defendant demurred to the indictment; the demurrer was overruled, and an exception taken; he then plead *not guilty* to the indictment, was tried, a general verdict of guilty was rendered, and sentence pronounced upon the verdict. Whatever principle the demurrer involved against the defendant, he was bound by; and whatever it involved for him, he was entitled to the benefit of at the trial.

Is the first count good? And *First*, as to the charge of embezzlement. Embezzlement at the common law is the fraudulent misappropriation by a person occupying a fiduciary relation, of portable property which he has received into his possession under it; the misappropriation constitutes a breach of the trust. It is there a misdemeanor in the case of public officers in respect to the property entrusted to them. With that exception it exists, as an offense, altogether by statute; consists of common law embezzlement, applied only to the property and trust, which the statute designates, is an extension of the common law only to those cases. Larceny is the fraudulent taking and carrying away of the personal property of another from his possession. The offenses are alike, in that they are committed by the tor-

tious taking, without the consent of the party to whom the property belongs; in the former upon the possession of the offender, not involving a trespass; in the latter upon that of the other party, involving a trespass; hence the offenses are radically different; and the facts which constitute the one, cannot be employed to establish the other. The two offenses are legal ideas founded on, and drawn from fixed and peculiar elements of fact. The count charges the defendant with embezzlement, without alleging its constituent facts; charges therefore a mere legal conclusion, leaving it impossible to determine whether the offense was committed, and the conclusion correct. As to all other offenses it is an invariable rule of pleading at the common law that the indictment must set forth facts sufficient to constitute the given offense, so as to notify the accused of what he has to meet; and unless it does, it charges **nothing** on which an issue can be raised by a plea of not guilty; the rule is founded on a principle that inheres in all other criminal cases, and equally applies to that of embezzlement. Hence an indictment for this offense must set forth the actual fiduciary relation and its breach. The English statutes of embezzlement are the 21 Hen. 8, ch. 7; 39 Geo. 3, ch. 85; 53 Geo. 3, ch. 63; 7 and 8 Geo. 4, ch. 29, and the 25 and 26 Vict., ch. 96; they all extend the offense to private trusts, Chitty and Archibald prescribe the rule, and corresponding forms; and correctly represent the English practice.

The rule is recognized by the supreme court of the United States; that controls this court, and it is immaterial what rule obtains in the states of the Union. Nevertheless it is proper to add that it prevails in Massachusetts, New York, New Jersey and Michigan; and that after careful search I have not found a different one in any other of the states, and have no reason to doubt that the rule is uniform in the state practice. A departure could not exist except by statute; and the strongest presumption would oppose the idea of such an intent; and an American statute to that effect could not stand, under the Constitution. The fifth

amendment of the latter declares that "no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury;" the provision is worthless, unless it intends a presentment or an indictment that contains substance enough to admit of an issue of guilt or innocence to be raised upon it. Therefore the count is bad for the reason that it does not contain the constituent elements of the charge.

It fails in another particular. Not alleging those facts, it does not identify the offense upon the record; and therefore does not secure the accused in his right to plead *autre fois acquit* or *autre fois convict* to a second prosecution for the offense. This right is made constitutional by that amendment; it declares that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb"; which, according to the 18 Wall, 163, *ex parte Lange*, means that he shall not be put in jeopardy of a second punishment for the same offense. This provision of the amendment erects the common law upon the subject into a constitutional sanctity.

To avoid the application of the rule, the government admitting that it applies to an offense existing at the common law, to which the statute affixes a penalty, but denying that it applies to an offense created by statute, claims that the act of March 3d, 1875, creates its offense. This proposition is based upon two grounds: The first, that notwithstanding embezzlement is a *tort* at the common law, to embezzle and to commit embezzlement are not the same, citing 11 Allen, 439, *Sawin* against *Martin*, and 1 Abbott's Law Dic., 422 and notes, and that a distinction between the two is established by section 5209 of the U. S. Rev. Stat.; and that the section has been so construed by the case of the *United States* against *Conant*, 29 Reporter, No. 2, for 1880, at page 36; and is also established by sections 5439, 5453, 5471, 5475, 5460, 5467, 5469, 5488, 5490, 5492, 5479 and 5401, of the same statutes; the second, that if the two acts are identical, embezzlement is not an offense at the

common law; and hence that upon either ground the statute of March 3d creates its offense; that upon either ground the words of the statute may be followed in counting.

As to the first ground. The learned counsel for the government does not indicate what "to embezzle" means, if in law it does not signify "to commit embezzlement." "To embezzle" is the verb correlative to "embezzlement," the noun,—is the only verb which completely answers to the noun; signifies to commit embezzlement; as a verb involves all the elements which the noun, as a noun, involves; and therefore describes alike the *tort* which constitutes at the common law the breach of trust, and under the statute the offense; the noun signifying the thing committed, the verb its commission. The authorities above mentioned, as cited to the contrary, contain no hint of the alleged distinction, but proved wholly upon the opposite idea; nor can a foundation for the distinction possibly exist except in a statute, and by its arbitrary use of the verb in a sense variant from its standard, popular and technical sense; and such a statute can only be a rule for itself.

Again, as to the first ground. Section 5209 declares that a president, director, cashier, teller or agent of an association, who "embezzles" its "moneys, funds or credits," shall be deemed guilty of a misdemeanor; employs the verb explicitly in its common law sense, and the term could not be applied under the section in any other, except by a sheer perversion of the text; and so *United States* against *Conant*, cited to the contrary, adjudicates. Each of the sections, 5439, 5453, 5471, and 5475, describes by the verb, and contains no other description of the intended crime, than what the verb imports, nothing to indicate that it is not employed in the common law sense; so that the sections must be understood as using it in that sense; otherwise they would be meaningless and impractical. Section 5460 describes by the verb, applying it to trustees of government property. Section 5467 describes in the same

way; and cannot be read, as intending an application to any but trustees. Section 5469 employs the verb either in the common law sense, or comparing it with section 5467 for larceny; I am inclined to think in the latter. Each of the sections 5488, 5490, and 5492, employ the term “embezzlement”; apply it only to trustees of government funds, and to conduct which would constitute embezzlement under private trust at the common law. Each of the sections, 5489 and 5491, employs the same term; applies it only to such trustees, and to such conduct as would be embezzlement under a private trust at the common law; also to conduct such as would be only negligence under a private trust at common law. I am wholly unable to perceive that the citations from the United States Statutes in anywise countenance the distinction claimed of them by the government; with the exception which I have designated, the provisions cited strictly follow the common law, simply extending its application; and the exceptions framed upon entirely other grounds, and furnish no rule but for their own application.

As to the second ground. The rule that, in counting upon a statutory offense, the words of the statute may be followed, is not intended to deprive the accused of the benefit of fine appraised, or to relieve the accuser of the necessity of apprising him of the facts that constitute the given crime—to enable the one to charge, and to compel the other to attempt to take issue upon a mere legal conclusion. The rule recognizes the right and the duty; and its observance satisfies both. Under the statute, equally as at the common law, the right to defend by plea exists; and it can be exercised only as a method of raising an issue—must therefore be preceded by facts, calling for, and to which it can be an answer. If the statute describes the crime that it creates, in terms, and without the necessity of resorting to the common law for an interpretation,—that is, describes completely of itself the act or acts that it makes criminal,—it must suffice, in counting upon the statute, to

Opinion of the Court—Peck, J.

follow it; but, if it describes by terms which necessitate a reference to the common law for the sense,—that is, does not describe completely of itself, but does describe by adopting a common law signification,—it describes by the common law, embodies it, sets it forth by relation, and the counting must be by that law, or it cannot follow, cannot satisfy the statute. A statute, in creating a crime, defines it; and may employ for the purpose a proposition of fact, or one of law only; all the ingredients of fact that are elemental to the definition, must be alleged, so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the act, that will do; if not, other allegations must be used. Hence the rule, to follow the words, is safe only when its effect will be to follow the act, to keep in its path. This accords with Hawkins, who, in his Pleas of the Crown in Book 2, ch. 25, sec. 113, says: “It does not seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly and expressly allege the fact, in the doing or not doing whereof the offense consists, without the least uncertainty or ambiguity.” The cases of the *United States* against *Mills*, 9 Pet., 138, and the *United States* against *Gooding*, 12 Whea., 460, which involved the question, were decided according to the rule, as it is stated by Hawkins. They are conclusive upon us. It is, however, worthy of note, that the case of the *State* against *Stimson*, 25 New Jersey Law, was decided upon this rule. This view restricts the rule of following the words of a statute, in counting upon a statutory crime, to consistency with the statute, the rights of the accused and principle. A different view would, when the statute describes the crime which it creates, by a reference to the common law, confine the count to the statement of a worthless legal conclusion; and employ the statute to frustrate the law of pleading and the constitution. The act of March 3 describes its crime of embezzlement by a reference to the common law.

Opinion of the Court—Peck, J.

Secondly, as to the charge of stealing. It is made only by stating a legal conclusion. The government seeks to avoid the necessity of charging a common law offense in a common law method, by alleging its constituent facts, by the position that the verb, "to steal," is not employed in the act as descriptive of a common law, but if descriptive of any, only of a statutory offense. I cannot concur in the proposition. A statute presumably uses a technical term in its technical sense, unless another is clearly intended. Larceny is a technical common law term; stealing is its technical common law synonym; to steal is the verb of stealing or larceny, the noun; to steal and to commit larceny are synonymous; the framing of a count for larceny under this statute required that it should have been framed as at the common law. Hence as to this offense the act was not properly counted on.

Thirdly, as to the charge of purloining: The government applies to the verb, "to purloin," the same theory which it does to the verb, "to steal." If a statute employs a term which has not a technical law, but has a standard popular meaning, it presumably employs it in the latter, unless another sense is clearly intended. Purloining is not a technical law—is a standard popular term—and means larceny; "to purloin" is its verb, and therefore stands in the statute as a mere repetition, in an untechnical form, of what precedes in the clause as to stealing,—is superfluous, and presents no additional views as to the duty of pleading.

Again, the count alleges that, by one and the same act the defendant embezzled and stole the sugar: by one act committed upon it two dissimilar crimes, the commission of one of which negates the possibility of the commission of the other. Thus the count nullifies itself, and charges nothing.

As it tendered no issue, the plea raised no issue upon it; it could not sustain a verdict of guilty; and the demurrer as to it was well taken.

Therefore it was the duty of the district court to disre-

Opinion of the Court—Peck, J.

gard the first count on the trial had under the plea. That would have been equally its duty, had there been no demurrer, because a court should of its own motion, refuse to try an immaterial issue of facts.

The remaining count is in common form for larceny: was good; tendered an issue of fact, capable of sustaining a verdict of guilty; and the plea raised an issue upon it. Can the present verdict be sustained? If not, can the defendant avail himself of the objection?

The evidence of the prosecution tended to show that on the 21st of September, 1876, McCann contracted with the government to transport for it for hire to sundry Indian agencies, Indian supplies, as he should receive them from it for the purpose; to furnish incidental storage between reception and delivery; and to deliver them in the same good order and condition in which they were when received—this contract imposing upon him the risk of the property, and conferring upon him, as against the government, the right of possession during the transit for the purposes of the contract: That on the 14th day of October of that year he received from the government, under the contract, at Philadelphia, fifty-two barrels of sugar; that in November following it reached Cheyenne, by the Union Pacific Railroad under his care, and was then stored by the railroad company here in its warehouse, subject to his order; that he soon removed it to a private one here, where he changed it into sacks, sent the sacks to Deadwood, and there sold it upon his own account; and that the breaking of bulk, change of package and subsequent sale were parts of, and in consummation of the purpose, with which he removed the sugar to the private warehouse. There the evidence for the prosecution stood, when it rested in its opening, and at the close of the entire testimony. The prosecution was bound by the tendency of its evidence. Embezzlement was the only crime that could be predicated of it: so that the government charged larceny, and proved embezzlement, if anything—charged one crime, and proved another. Following

Opinion of the Court—Peck, J.

the evidence, the jury must have found a verdict for embezzlement, and the record, if allowed to stand, will not protect the accused from a future prosecution for the same offense. The government and the accused were respectively interested in, and bound by the common law and the constitutional inhibition upon the subject. The inhibition could not be waived: the inability to waive is not forcibly and fully illustrated by the *People against Cancimi*, 18 N. Y., 128. As there was no evidence tending to sustain the count, there was then none to go to the jury; and it was the right of the defense in its election, either at the close of the opening evidence for the prosecution, or at the close of the whole evidence, to have the jury directed to return a verdict of acquittal; omitting to do so, it was the duty of the court of its own motion to so direct; it was equally bound by the rule, and could not shape the case to an abortive result.

Again, the above-mentioned evidence was uncontradicted. At the request of the government, and subject to the exception of the defendant, the court charged that, "if a bailee, who has charge of the goods or property of another, with intent to steal, breaks bulk and removes the property from the original package, the act of breaking bulk for a purpose inconsistent with the object of the bailment, and for the further purpose of feloniously converting the same to his own use, constitutes in itself the crime of larceny." The instruction was erroneous in four particulars:

It allowed the jury to determine the verdict: it misstated the testimony in assuming, and therefore in stating in effect that it tended to establish a conversion by breaking the bulk; whereas its only tendency to establish a conversion was by shifting to the private warehouse; for that, if anything, was a complete appropriation of dominion over the property. But whether the appropriation was consummated by shifting from one warehouse to another, or by shifting from barrel to sack, and though it was done feloniously, the instruction misstated the law by denominating it larceny,

Opinion of the Court—Peck, J.

because the appropriation lacked the characteristic of larceny, it not having been committed by trespass: and the law was equally misstated in predicating of the conversion the intent to steal. The verdict is explainable only upon one of two hypotheses: either that the jury, finding that a felonious conversion had been committed, treated it as embezzlement (herein understanding the law better than the court did), and returned a verdict for larceny; or, misled by the instruction, treated it as larceny, and returned a verdict accordingly. If the former was the case, they returned a verdict for a crime which was proved, but not charged; if the latter was the case, they returned a verdict for a crime which was charged but not proved. In either aspect the verdict is void, and a new trial should be ordered. This leaves it open to the government to elect its course; whether to prosecute this indictment further, or to apply to the grand jury for one that fits the proofs. It is due to the learned counsel, who represents the government upon this appeal, to say that he is not responsible for the fact that the indictment and proofs do not fit. The further prosecution of the case must proceed upon the same transaction, which appears upon the present evidence of the government; and must be fruitless, if the foregoing considerations, relative to the merits, are sound. In this view it is superfluous for the purpose of a new trial to consider the other questions, which appear upon the record, as they are subordinate; and their determination could not relieve the case of the primary defects, already considered, that enter into the merits. But Mr. Justice Sener votes for an affirmance, and Mr. Justice Blair for a new trial: and I understand the latter to so vote on one question only, a question belonging to the merits, and to what I have called the subordinate questions. As I concur in the result which he has reached upon the subject, it is desirable that I state my views upon it; and this I proceed to do.

The prosecution introduced in its opening, evidence

Opinion of the Court—Peck, J.

which tended to show that McCann had feloniously diverted the sugar; and on this testimony claimed a verdict. Evidence was also introduced, which tended to show that under the contract the sugar was not to have been shipped from Philadelphia until the spring of 1877, when it was to have been sent by the Missouri river to the Crow and Blackfoot agencies in Montana; and was erroneously sent in the autumn of 1876 west of Omaha by rail; that he notified the commissioner of the Indian bureau of the misshipment, and thereupon was instructed by the latter to divert it to the Spotted Tail agency; that on the next day, October 29th, 1876, he wrote to the bureau for leave, as a matter of economy to the government and himself, to sell the sugar on his own account, upon the condition of replacing it by a spring purchase at Philadelphia of the same amount, to be sent from there in the spring by the river to the Crow and Blackfeet agency; and that, after the direction had been given to divert to the Spotted Tail agency, another arrangement was made between him and the bureau respecting the property. In this state of the evidence, and at this point, and on his direct examination as a witness for himself, he was asked to state that further arrangement. The question was excluded, and an exception taken. The admission or exclusion was determinable by the theory of the prosecution, as presented by its testimony, and in connection with all the evidence therein on both sides, the question called for an answer, that might have shown an arrangement between him and the bureau either by assent to the letter, or for some other diversion of the sugar. Had the answer tended to show such arrangement, it would have shown an authority to him to appropriate the sugar; and it would have been his right to go to the jury upon the question, whether he obtained the authority, believed that the bureau could give it, and, in committing the appropriation complained of, kept within the authority; and it would have been the duty of the court to instruct, and of the jury to find, according to this right.

Opinion of the Court—Blair, J.

that is, it would have been the duty of the court to instruct, and of the jury to find, if these three propositions were true, that he was not guilty; and had the answer shown only a belief on his part that the authority was and should be given, and that he kept within it, he would equally have been entitled to a verdict.

A new trial should be ordered.

BLAIR, J. This cause is brought here on a writ of error by the plaintiff in error for review. From the record it appears that at a district court of the first judicial district, sitting at Cheyenne, in the county of Laramie, at the November term thereof, A. D. 1877, the grand jury found an indictment against the plaintiff in error for felony. The indictment contains two counts. The first count charges, "That on the 10th day of November in the year of our Lord, one thousand eight hundred and seventy-six, Dwight J. McCann (the plaintiff in error), yeoman, late of the district aforesaid, at and within the district aforesaid, twenty thousand pounds of sugar, at the value of ten cents per pound, of the goods and chattels and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal and purloin contrary, etc."

The second count is similar to the first, except that it charges, that the plaintiff in error feloniously did take, steal and carry away, the sugar in the first count described.

The plaintiff in error appeared and filed a demurrer to the indictment, alleging in substance: First, That the indictment and matters therein contained, were not sufficient in law, etc. Second, That the first count of said indictment, and the matters therein contained as stated, were not sufficient in law, etc. Third, That the second count of said indictment was no part thereof, and further that the second count, and the matters therein contained as stated, were not sufficient in law, etc.

Opinion of the Court—Blair, J.

It seems to be admitted that the indictment was drawn under an act of congress approved March 3d, 1875, which reads as follows: "That any person who shall embezzle, steal or purloin any money, goods, chattels, records or property of the United States shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States, in the district wherein said offense may have been committed, or into which he shall carry, or have in possession of said property so embezzled, stolen or purloined, shall be punished therefor by imprisonment at hard labor, in the penitentiary, not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

The demurrer was overruled by the court and the defendant excepted.

The first question which would seem to require consideration, as claimed to be reached by the demurrer, is that of jurisdiction.

It will be observed that the first part of the above act makes it a felony for any one to embezzle, steal or purloin any money, goods, chattels, records or property of the United States, and where the crime thus defined is committed and the person guilty of the offense convicted before the district or circuit court of the United States, in the district wherein said offense may have been committed, or into which he shall carry, or have in possession of said property so embezzled, stolen or purloined, the punishment prescribed by the statute follows. It is therefore contended as a legal conclusion, that before any penalty can be inflicted under this section, the party charged with committing the offense must be duly convicted, and convicted not only before a court having the same jurisdiction as the courts mentioned in the statute, but before a court recognized by the constitution as a district or circuit court of the United States, and no other.

The organic act of this territory in referring to the

Opinion of the Court—Blair, J.

supreme and district courts, created by that act, says, "And the said supreme and district courts respectively, shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the constitution or laws of the United States, or of the territory affecting persons or property. But in order that there might be no doubt as to whether the district courts of the territory were by the above provision clothed with the same authority and jurisdiction of the circuit and district courts of the United States, congress ingrafted in the organic act a further clause, which not only settled that question beyond all controversy, but makes manifest the intention of congress by so doing. It is as follows: "And each of the said district courts, shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States."

It would seem not only useless but an unprofitable task after the decisions in the case of *Benner v. Porter*, 9 Howard; *American Insurance Company v. Cauter*, 1 Peters; and *Clinton v. Englebrecht*, 13 Wallace, to attempt to maintain the proposition that there is such a court as a district court of the United States in the sense of the Constitution, in the Territory of Wyoming.

Chief Justice Chase in his opinion in the last named case has I think, closed the door to further discussion in that regard.

To maintain the proposition that the court below had jurisdiction in this case, it must be done on some other theory; that theory should be founded on justice and consonant with reason.

Having now settled beyond all controversy that the district courts of this Territory, are vested with all the power, authority and jurisdiction that is vested in and can be exercised by the district courts of the United States, and that congress intended they should be, the question now returns with all its force, whether under section one, under which

Opinion of the Court—Blair, J.

the indictment in this case was drawn, the court below had jurisdiction in this case. In construing section one, above referred to, it is but fair to keep in view the power and jurisdiction conferred by congress on the district courts by the organic act, as well as the decisions in regard to whether the district courts in this Territory are district courts of the United States.

In order therefore to arrive at a proper solution of the question herein presented, and in order to ascertain the true intent of congress and give a reasonable construction to section one, we must consider the fact that congress had, long prior to the enactment of section one, passed the organic act, and that most if not all the decisions before referred to had been rendered before section one became a law. No one, I presume will contend for a moment that congress intended that section one should apply only to district courts in the states; this would be equivalent to saying that it is only in the states, where such offenses are or can be committed—an indirect compliment to the inhabitants of the Territory, however just, is one in my opinion not likely soon to be paid.

After much reflection, but still not wholly free from doubt, I have come to the conclusion that congress did not use the words district or circuit courts of the United States in section one, in the sense of the Constitution, but in a more popular and liberal sense, which gave, and was intended to give those district courts which were vested and clothed with the same, or like authority and jurisdiction as is vested in the circuit and district courts of the United States in the sense of the Constitution, and consequently, with full authority and jurisdiction to try and punish all persons found guilty of the offense created by, and described in section one.

That the district courts of Wyoming Territory are in one sense district courts of the United States, I entertain no doubt: but as I have remarked before, that while they cannot in a constitutional sense be called district courts of the

Opinion of the Court—Blair, J.

United States, and are designated by the supreme court as legislative courts, they are nevertheless for all purposes district courts of the United States.

I am not unmindful of the fact that I have not given the act in question that strict and literal construction contended for by counsel as the rule in criminal cases, but to do otherwise than I have done I would have to pre-suppose that congress, composed as it is of some men of the highest legal attainments to be found in the land, and the chosen representatives of an admiring constituency, had committed at least a most unpardonable blunder, if nothing more.

I pass now to consider the sufficiency of the indictment, about which I have but little to say. One cannot examine the record in this case without being forced to the conclusion that the prosecution relied wholly upon the second count, and not on the first. Hence I shall not review the alleged errors as to the first. The second count I hold sufficient. The only objection urged against it was, that in commencing this count, the word "*An*," is used instead of "*And*," and therefore it was connected in no way with the caption of the indictment. All I have to say as to this objection is, that nothing short of an act of a Wyoming legislature could induce me to decide that a count in an indictment was bad, for the omission of one letter which it should contain. The proposition, I take it, will hardly be questioned, that where an indictment contains more than one count, if one be good, it will support a general verdict.

This brings me to consider the much graver questions which arise in this case, and which calls for the most patient, thoughtful and thorough investigation.

It is apparent from the record that the defendant did not deny, on the trial in the court below, the appropriation of the property, which is charged to be the subject of larceny, but on the contrary admitted its appropriation, but sought to remove the presumption of guilt which would legally follow the conversion of the same by showing a claim of right in the property so appropriated, in himself. It is also

evident from the record, that the defendant's claim, or pretended claim of right in the property, was derived through the commissioner of Indian affairs, with whom he had contracted to deliver government goods, at certain agencies. With this short review of what the record discloses on this point in the case, we will be the better prepared to consider rightly the materiality and competency of the evidence sought to be offered by the defendant as to his alleged claim of right to the property described in the indictment.

The defendant, being on the witness stand, was asked in substance if he had made any arrangement with the agent of the government, in respect to the sugar in question. Having given an affirmative answer to this question, it was followed up as follows: "You may now state what that arrangement was." Objection being made the court sustained the objection, and refused to let the witness respond to the question.

Was the evidence sought to be offered relevant, material or competent? If it was, it was error in the court to reject it; or to state the question in a different way, but to the same effect, was it competent for the defendant under the indictment, after admitting a conversion of the sugar, to show a claim of right in himself? It certainly was. However frivolous or unfounded this claim of right might have been, it should have gone to the jury for their consideration. If it proved to be frivolous and unfounded in the judgment of the jury, it would weigh the more heavily against him. If, however, it proved the contrary, it might have relieved him from the least suspicion of criminal intent, and secured him a speedy deliverance. The grounds of objection to the evidence were, first, that it was not permissible to vary the terms of the written contract, under which the defendant had possession of the sugar; second, because in no event had the commissioner a right to authorize a diversion of the goods purchased under act of Congress for the use of a given Indian tribe.

It appears that the sugar mentioned in the indictment

was, by mistake, sent in the direction of Montana, via Corinne. The defendant telegraphs the commissioner, inquiring if it was not an error or mistake, and asking instructions. The acting commissioner replied, directing the sugar to be sent to Spotted Tail agency.

The defendant claims he wrote to the commissioner and asked permission to dispose of the goods at Salt Lake, and to replace the same in the spring.

It further appears that the goods were returned to Cheyenne and stored, and it was at that place, it is charged, the defendant converted them to his own use. By whose authority they were returned to Cheyenne does not appear. It was in this state of the case that the defendant offered to prove an arrangement with the commissioner of Indian affairs, by which the defendant might dispose of the sugar, and supply an equal amount the following spring.

The first ground for ruling out this evidence I think wholly untenable. Had it been a civil action there would have been some room for doubt as to its competency, but being a criminal prosecution, to my mind there can be none.

As to the second ground of objection, assuming that the defendant had made such an arrangement, as he claimed he had made with the acting commissioner, had he a right to presume, as a reasonable man, that the commissioner was acting in good faith, with full authority to act in the premises, that he had a right as the agent of the government, to exercise a sound discretion in regard to matters that cannot be foreseen; notably, such a mistake or error as is claimed to have been made in the shipment of the sugar. It seems to me he had. But to my mind the overshadowing question here is, not whether the commissioner of Indian affairs in law and in fact possessed the authority to make the alleged agreement with the defendant, but did he make any agreement at all; and if so, did the defendant under the circumstances act as any reasonable and prudent man would have acted, under like circumstances. I repeat, this is the whole question involved in the exclusion of this evi-

Opinion of the Court—Blair, J.

dence from the jury, and it was error, in my judgment, to exclude it, for the obvious reason that it was the peculiar province of the jury to pass upon what I consider this most material question.

After the testimony was all in, it appears from the record that the counsel for the defendant requested the court to charge the jury as follows: "Ninth, That if the defendant took the property described in the indictment under an honest claim of right to do so, and under an honest belief that he had authority to take the same and dispose of it, then the act of taking would lack the felonious intent necessary to constitute the crime charged, and it is for the jury to say, in view of all the facts and circumstances in evidence, what the intention of the defendant was." Which charge the court refused to give, and to which refusal the defendant excepted. Now upon what theory was this charge denied. It certainly was manifest error.

The counsel for the defendant also requested the court to charge the jury as follows: "Tenth, That if the defendant took the property described in the indictment and converted the same to his own use under an agreement with the officers of the United States that he should do so, and return the like amount of property to the United States; or if he took such property with an honest belief on his part, that he had such agreement and authority, then he cannot be found guilty as charged in the indictment." This charge the court also refused to give.

It does seem to me that the refusal of the court to give this and the ninth instruction was error, in any view that they may be considered; it was saying in effect, it is a matter of no consequence whatever whether the defendant had or had not, before he converted the property, made an arrangement with the officers of the government to replace the same the ensuing spring; nor whether the said officers had or had not authority to make such an arrangement with the defendant; nor whether the defendant converted the property to his own use under an honest belief that he had.

Opinion of the Court—Sener, C. J., dissenting.

by reason of said agreement, a valid and legal claim of right to said property; that his motives and purposes however honest and pure, or the circumstances under which he converted the property to his own use however conclusive to establish his innocence of the crime charged, are of no consequence whatever; that when the fact is once established that the defendant converted the property to his own use the law *eo instanti* pronounces him guilty, and that there is no balm in all Gilead that can save him from the penalty of the violated law. Can it be possible that this is the law? I cannot think so, but assuming that it is, then I frankly admit the ruling of the court in refusing to permit the defendant to testify as to the alleged agreement with the agent of the government in respect to the sugar in question, was not only unquestionably correct, but also the ruling in refusing to give instructions Nos. 9 and 10. But if on the other hand the position assumed by the district attorney in his argument be true, namely: that before the case was formally given to the jury, the substance if not the whole of the alleged agreement was indirectly, if not directly, before the jury; then the ruling of the court in refusing to give instructions nine and ten, was unquestionably erroneous, for the obvious reason that the court could only refuse to give them in case there was no evidence before the jury tending to show the nature of the agreement between the defendant and the commissioners of Indian affairs.

I deem it useless to pursue the record further; it discloses to my mind grave errors besides those I have considered. Let it suffice for me to say that I am of opinion that the judgment of the court below should be reversed and the defendant granted a new trial.

Judgment reversed.

SENER, C. J., dissenting.

I dissent from the reasoning and conclusions and the

Statement of Facts.

final order to be entered in this case, by my honored associates.

In my opinion the court below was clothed with full jurisdiction to try and determine the case; and I am further of opinion, after a full inspection of the record, and mature consideration of the arguments of counsel and the cases cited, that there is no such error in the transcript of the record as presented here, as can or should authorize this court to disturb the verdict and judgment of the court below, by setting aside the judgment and sentence there entered. Being of this opinion, my conclusion is that the judgment of the court below ought in all respects to be affirmed, and the sentence of the prisoner as by that court ordered, should be carried into execution.

LEE v. COOK AND COREY.

EJECTMENT.—In ejectment the plaintiff must recover, if at all, upon the strength of his own title. If the defendant can show an outstanding title in another, it will defeat the plaintiff's right of recovery.

JUDGMENT : LIEN.—Where an execution is issued, and levied on real estate while the lien of a judgment thereon is in force, and a sale under the execution is properly made, and a deed, executed to the purchaser, such deed will relate back to the date of the judgment, and the title which the defendant had at that time will pass.

ERROR to the District Court of Uinta County.

This was an action brought for the recovery of real property in the district court of Uinta county. Plaintiff claims under a deed dated October 26th, 1875, but the acknowledgment and recording was not until November 15th, 1875, so that for the purposes of this controversy the date of the deed is November 15th. In addition to the deed he shows possession at the date of the deed, and for some time prior thereto, in his grantor Amanda E. Foye, and Arnold L. Foye, her husband, and upon that rests.

Argument for Plaintiff in Error.

The defendants show a sheriff's deed to the property to Harvey Booth, under whom defendants occupy the premises, issued on a sale of the property in controversy by the sheriff of Uinta county, by virtue of a judgment and execution in a case of *John W. Anthony v. Arnold L. Foye and Amanda E. Foye*. The judgment was rendered July 17th, 1875, which was the 12th day of the term, the same commencing on the first Monday of July. The judgment was a money judgment against the said defendants Foye, and also commanded the sale by the sheriff of lands covered by lien. The sale was made December 27th, 1875, and execution issued November 13th, 1875. On February 25th, 1876, the said sale was confirmed and deed ordered. The date of the sheriff's deed is April 9th, 1876.

The case was tried in the court below without a jury; the findings were for the defendants (Cook and Corey,) and judgment was rendered in their favor for costs.

W. W. Corlett, for plaintiff in error.

The purchaser at a sheriff's sale must show not only his deed, but a judgment and levy in addition. *Carlisle v. Langworth*, 5 Ohio, 368; *Rover on Judicial Sales*, page 213; *Allen v. Parisel*, 3 Ohio, 188; *Wheaton v. Sexton*, 4 Wheaton, 503; *Ludlow v. Barr*, 3 Ohio, 388; *Newman v. Cinn*, 18 Ohio, 323; *Fowler v. Whitman*, 2 Ohio S., 270.

After the plaintiff established a *prima facie* right to the land, the defendants were bound to show affirmatively a better right in order to defeat the plaintiff's cause of action. *Roads v. Symes*, 1 Ohio, 283; *Styles v. Murphy*, 4 Ohio, 92; *Freeman on Judgments*, pages 2, 26-30. *Compiled Laws of Wyoming*, pages 82-84, secs. 377, 378, 381, 389-391, 394; also, pages 69, 70, secs. 275, 279, 280. The execution did not conform to the judgment, and the sale made under it is therefore void. *Rover on Jud. Sales*, secs. 570, 572; *Rider v. Alexander*, 1 Chips, 274; *Butler v. Haynes*, 3 N. H., 21; *Cooper v. Sunderland*, 3 Clarke (Iowa) 114; *Frazer v. Stewards*, 7 Iowa, 346.

E. A. Thomas and C. N. Potter, for defendants in error.

Without reference to the fair presumption as to date of levy, the land in controversy was subject to the payment of the judgment in *Anthony v. Foye*, before the transfer by Foye to Lee, a judgment being a lien upon all the lands and tenements of the judgment debtors from the first day of term at which judgment was entered; and the judgment in *Anthony v. Foye* became a lien on the said property from the first Monday of July, 1875, and was a subsisting lien at the time of the pretended transfer to Lee, and title under sheriff's deed dated back to the first Monday of July, 1875. Compiled Laws Wyo., page 88, sec. 427; Freeman on Judgments, sec. 338; Rover on Jud. Sales, 2d ed., secs. 1020 and 1025; *Kirk v. Vonberg*, 34 Ill., 440; *Riddle v. Bryan*, 5 Ohio, 48, 55; *Conard v. The Atlantic Ins. Co.*, 1 Pet., 443; *Union Bank of Mo. v. Maynard*, 51 Mo., 548.

As the action of ejectment rests upon the present right of possession of the plaintiff, if the plaintiff or his grantor can be shown to have parted with their right of possession in any way, this is a good defense, which even a trespasser may use, although it amounts to establishing title in a stranger; or, in other words, any defendant, whether *he be* or be not a trespasser, may show an outstanding title in a third person, derived through the plaintiff or his grantor, inasmuch as such a title would defeat plaintiff's right to possession, and this although defendant does not connect himself with such title. *Mallet v. Uncle Sam &c. Co.*, 1 Nev., 188; *Dyson v. Bradshaw*, 23 Cal., 528; *Bird v. Lisbros*, 9 Cal., 1; *Bruce v. Mitchell*, 39 Me., 390; *Jackson v. Harrington*, 9 Cowen, 86; *Bird v. Dennison*, 7 Cal., 297.

SENER, C. J. This case was an action brought by the plaintiff in error here as plaintiff in the court below, held in and for the county of Uinta, against the defendants in error here, who were the defendants below, to recover the possession of a lot of land in Evanston, Uinta county, in this

Opinion of the Court—Sener, C. J.

Territory, and damages for the detention thereof. The petition which originated the case in the court below, is in the nature of an action of ejectment, and for all purposes has been and should be treated as such.

The defendants in their answer admit their possession and detention of the premises at the time the action was brought, but deny ownership in the plaintiff, and his right of possession and recovery in this action.

The case was tried in the court below without a jury, and the findings of the court below were for the defendants, and judgment was rendered for the defendants for their costs. The plaintiff in error has brought his case here properly, to the end that the judgment of the court below may be reviewed and vacated, reversed or modified, if to this court there shall seem to be error requiring it to do so.

The plaintiff in the court below, to maintain his case, produced a deed from A. L. Foye and Amanda E. Foye, his wife, dated October 26, 1875, and recorded November 15, 1875, for the lot and buildings in controversy. He also offered one C. M. White, to prove that Amanda E. Foye was the owner of this property on the 15th of November, 1875, an effort in effect to nullify the deed just recited, for the force of the deed of October 26, 1875, recorded November 15, 1875, seems to us to put the title of the property on the 26th of October 1875, in A. L. and A. E. Foye, and not in A. E. Foye alone, and that the title of A. L. and A. E. Foye passed as of that date to Alfred G. Lee as between themselves, and vested as of October 26, 1875 in Alfred G. Lee as between Lee and the Foyes, whatever they then had to pass of title in and to said property. In so far as this testimony was offered to show that A. L. Foye had no ownership in this property, we think it unimportant for Lee's side of the case. If A. L. Foye had no right in this property and Amanda E. held it as a *feme sole*, why then should A. L. Foye have been joined with her in the conveyance? Was it necessary? Clearly Lee thought so, for we find him relying upon a deed in this cause to which A. L. Foye was

a party—that dated October 26, 1875, and recorded November 15, 1875.

In all proceedings in ejectment the authorities lay down three essential things to be alleged and proved :

I. The plaintiff must prove that he has the legal estate in the premises at the time of the demise laid in the declaration (here the petition.)

II. That he had also the right of entry.

III. That the defendants or those claiming under them, were in possession at the time the declaration (here the petition) in ejectment was served.

The first proposition necessarily implies that the plaintiff should set forth his legal title in his declaration (petition) *i. e.* his *demise*, the conveyance under and by virtue of which he relies to maintain his action. This he failed to do. The defendants did not demur, but filed a paper asking for a more explicit declaration, but this they afterwards withdrew and filed their answer, so that they apparently waived this defect, and so the plaintiff without raising by the proper pleading a right to offer his deed of October 26, 1875, recorded November 15, 1875 in evidence, yet offered it and it was received without objection in evidence.

The second proposition for the plaintiff to establish was his right of entry at the time of the demise laid in the declaration. And here the plaintiff absolutely offered a witness to prove that Mrs. Foye was the owner of the premises in question on that day, an effort in effect to nullify the deed of October 26, 1875, and certainly clouding by its statement the ownership of that day, if parol testimony was admissible for this purpose or for the purpose of impeaching as between Lee and the Foyes, the recitals of the deed of November 15, 1875, whereby the property in controversy was sought to be conveyed to Lee; but relying on the deed as we must, let us grant that Lee had the right of entry to the premises in controversy, though it may have been that *eo instanti* upon the sale by the Foyes to Lee, that Lee may have carved out a lease for one year, and was not entitled then to the

possession, and Mrs. Foye was by virtue of that lease made after ten o'clock of that day, for the deed is shown to have been recorded at ten o'clock of that day. And White, in speaking of Mrs. Foye's ownership, is strangely lacking in exactness of statement as to when Mrs. Foye's possession began and ended. Was he trying to show for Lee's benefit that Mrs. Foye was the owner and in possession before Lee's deed became operative at ten o'clock of November 15, 1875, or was he trying to prove for the defendant's advantage that Lee had the title, but had parted with the right of entry? We think neither view material, the deed must speak for itself as between Lee and the Foyes, and we will hold that Lee had the right of entry.

The third proposition of law was assented to by the defendants, viz.: that they were in possession of the premises at the time the declaration, or petition in ejectment, was served.

The plaintiff, after himself giving some testimony which it is not necessary here to refer to but will be noticed hereafter, rested his case. Then the defendants' turn came. Now we must remember that in ejectment, the plaintiff in every form recovers only on the strength of his own title. And so the defendants offered to show an outstanding legal title in another to defeat the plaintiff's right of recovery, as undoubtedly they had a right to do, without claiming under it or deducing it to themselves, either by legal conveyance or operation of law. Greenleaf on Evidence, 5 edition, 2 vol., sec. 331.

To do this, they offered in evidence a deed made by the sheriff of Uinta county, dated April 19, 1876, conveying the same property claimed in the plaintiff's declaration, or petition, to one Harvey Booth for the sum of one thousand six hundred and fifty dollars. The plaintiff objected to the introduction of this deed stating that the defendant had not shown the proceedings to be regular in the case of *Anthony v. Foye* out of which the deed came, or that the court had jurisdiction of the person of the Foyes or the

subject matter of that suit, or authority to render judgment therein.

We think the objections of the plaintiff below were properly overruled, and that the deed was properly admitted in evidence. By the statute law of this Territory, General Laws of Wyoming, p. 92, sec. 444, it is expressly provided that, "the deed, such an one as this, made by a sheriff in pursuance of an execution, shall be sufficient evidence of the legality of such sale and the proceedings therein until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment. This statute then proceeds to state what the recital of such a deed shall be. Closely inspecting the deed in this case, Lee, if a stranger to it until recorded, as will be presently shown that he was not, could only find that one essential was lacking, viz., that it failed to state the amount of the judgment under which the sale was made in virtue of which the title was alleged by this deed to pass to Booth. This objection or lacking requisite of the deed as against a stranger, would have been cured, we think, in this case by the introduction of so much of the proceedings as were given in evidence in this case as bear upon the question of the regularity of the judgment and sale to Booth, and of the binding force and validity of the deed under which Booth took. In these proceedings thus introduced, the amount of the judgment is shown to have been the sum of one hundred and thirty-four dollars and thirty cents, and costs, and in these very proceedings this same Alfred G. Lee, as we take it, appeared and objected to the confirmation of this sale and the consequent deed to Booth. He had then his day in court, was heard, and his objection overruled. He excepted, but either became satisfied with the court's ruling or having failed to seek to have that judgment reviewed in this court has lost his opportunity to do so by the running of the statute fixing the time within

Opinion of the Court—Sener, C. J.

which writs of error may be brought here for that purpose, and in either case the action then and in that proceeding has become final as to him. But it may be said that possibly the A. G. Lee mentioned in the *Anthony v. Foye* proceeding is not the same A. G. Lee who is the plaintiff in error here, and who was the plaintiff below. The answer must be to this that A. G. Lee was in court in this proceeding, and made no attempt to rebut the very evident presumption, that the A. G. Lee of the *Anthony v. Foye* case was the A. G. Lee of this case, and as the purpose and legal effect of the introduction of the proceedings of sale under the *Anthony v. Foye* judgment was to defeat Lee's claim in the court below, we are forced to the conclusion by legal presumption that A. G. Lee of the *Anthony v. Foye* judgment is the A. G. Lee of this case.

A great deal was said about the necessity of showing when the levy was made. Now a levy is made for the purpose of acquiring a lien. The deed of the sheriff and the proceedings brought into this case showing the judgment of *Anthony v. The Foyes* and the sale thereunder, or in consequence thereof, and in virtue of which Harvey Booth acquired title, which is the outstanding title in a third party set up by the defendants in the court below and relied on here to defeat the plaintiff's recovery, shows that whole proceeding to have been for the purpose of enforcing a mechanic's lien, which lien by the recitals of the sheriff's deed which were neither contradicted nor sought to be contradicted, dated from some time in Sept. 1873, and of course must have existed at the time the judgment was rendered, because it was in virtue and by reason of such lien that judgment was rendered, and yet it was really contended in argument that there was no proof that the Foyes owned at the time the judgment was rendered on the 17th of July 1875, the property afterwards sold by the sheriff and now in controversy in this case. It seems to us as beyond any dispute that the Foyes were the owners of this property subject to the lien, at the time the judgment upon the lien

was rendered, to-wit: July 17th, 1875. The very first section of the mechanics' lien act, General Laws of Wyoming, p. 459, approved Dec. 1, 1871, under which the *Anthony v. Foye* proceeding was had, provides that any person who shall perform any labor, etc., * * * on any house, mill, etc., by virtue of a contract expressed or implied with the owner thereof or his agent, shall have a lien to secure payment of the same upon such house, etc., etc., and the lot of land upon which the same shall stand." The very fact that the court was ascertaining a mechanic's lien on the 17th day of July 1875, made it by force of irresistible conclusion ascertain the lien as existing on that day as a pre-requisite to its right to enter judgment to enforce the lien and to ascertain the lien. It had under the statute to ascertain that the Foyes were the owners of the property at the time the lien was created, and so ascertaining it further necessarily found that it was continuing and in existence on the 17th day of July 1875, and that is all-sufficient to fix the lien of the Foye judgment as anterior to the sale to Lee and so superior to it, because *prior tempore, potior jure*. This same act in section 6, further provides for bringing actions to obtain judgments and declares that "the lien shall continue until such suit or suits be finally determined and satisfied."

From what has thus been stated, it will, of course, hold that this court does not consider the judgment of *Anthony v. The Foyes*, as purely a money judgment. It was, of course, proper and necessary, indeed indispensably so, that the court should ascertain, before attempting to execute the lien, that there was in fact any subsisting lien, and the amount of it reduced to dollars and cents; the parties must be called into court, the lien judicially ascertained, and that it had not been paid and was still due and owing, then the court was in condition to enforce the lien, and its merely stating on the face of the order making the judgment and directing a sale of the encumbered property, that it should be done unless the judgment was paid in twenty days, cer

tainly cannot be construed to mean that for this alone it should be avoided. The court by that act, we take it, did no more than to suspend enforcing judgment for twenty days, as during that time by its express direction the sheriff could not proceed to enforce the judgment by execution. To the objection that the judgment ought to have described with accuracy the property sold, it may be, we think, successfully replied that doubtless the execution did that, for there is no copy of it here to show the contrary, and undoubtedly the clerk might very properly, if the judgment was defective in this respect, have referred to and used in the execution the description of the property as covered by the lien, for doubtless the lien was faithfully described in the petition, if not actually embraced in it as it might have been. And especially are we led to this conclusion, since the court in its confirmation of sale by the sheriff, in *Anthony v. The Foyes*, declares all the proceedings to be regular. But it was claimed that Amanda E. Foye was never served with process in the *Anthony v. Foye* case, there is nothing in proof to show that she was, and there is nothing, we think, in the record as presented here to show that she was not. Corey says he appeared as her counsel, and if uncontradicted, as it was, we think, that would be sufficient; but the journal entries in *Anthony v. The Foyes*, show her appearance and pleading, and that is all-sufficient in this case, even if it were possible to raise that question in this collateral proceeding.

This brings us to notice the character of Corey's possession, though we do not deem it essential to do so in the decision of this case, for reasons before given. We say Corey's, for Cook seems to have held in privity with Corey, and not independently of him. Lee says in his evidence that he, (Lee), after purchasing, leased to A. L. Foye, from whom he received possession January 1st, 1876. The sheriff's sale occurred December 27th, 1875. That *some time afterwards* he loaned the key to one Parkhurst to remove some articles therefrom, that Parkhurst negligently

Opinion of the Court—Sener, C. J.

left it in the door, and Corey, as attorney for H. Booth, took it. Here, then, is a clear statement from Lee himself, negating the idea that Corey was a trespasser. Lee says, Corey's possession was Booth's. Booth's right of possession was then inchoate, but it became complete so far as the *Anthony* case went, when the court confirmed the sale on the 29th of April, 1876. Corey says he took the key as counsel for Mrs. Foye. Corey does not controvert the fact, however, that he took the key, but that in taking it it was to take it for Booth, or that he held it at the time this action was brought for Booth. He does not deny that though he may have taken the key, and may be in the possession as Mrs. Foye's attorney, yet he does not deny Lee's statement that he took it for Booth; indeed the showing of the outstanding legal title in Booth, coupled with Lee's statement of how Booth got the key, or through whom he got it, raises in our minds the fair presumption that Corey held for Booth, and Cook, holding in privity with him, did the same.

Nor has Corey in this done anything inconsistent with his acting as counsel for the Foyes. When he took the key is not exactly shown, but he took it after January 1st; the sale was then made, not confirmed; seeing it in the door he knew that the sale was made, and, if confirmed, Booth would be let into the premises by the aid of the court, if necessary, upon request, and so taking he doubtless held the key until after the confirmation on February 12, and then either delivered to Booth or held it for him, no doubt as a lawyer for the Foyes, knowing that the sale would be confirmed, or believing it would be, but of his views or opinions it is not necessary to speak. It is sufficient that he did take, as Mrs. Foye's attorney, and that he doubtless delivered to or held in right of Booth from the time of confirmation, which was right. It is true Lee speaks of Corey as Booth's attorney, but we think this statement grew out of the fact that Lee knew that Corey delivered the key to Booth, or took it for him, and from this act deduced the relation of attorney and client. There is nothing in the records of the *Anthony*

v. *Foye* case to establish this relation of attorney and client, and there is nothing in this single act to establish such a relation, and Lee states no other fact that would lead us to infer it, in his testimony, and he could hardly be in position to know of such confidential relation, and so far as either case is here there is nothing to sustain the theory of any such relation between Booth and Corey.

From what has been said, we think it clear that Cook and Corey, the defendants below, were entitled to show, and did show, such an outstanding legal title to the property in controversy in another as tended to defeat, and should defeat, the plaintiff's right of recovery.

But it may be claimed, as it was in *13 Smedes & Marshall*, thirty years ago, that if both parties to an ejectment suit claim through one person as a common source, the defendant will not be permitted to set up an incumbrance by such person as an outstanding title. This proposition the supreme court of Mississippi then said was too broad; so say we. The court then say: "The plaintiff in the first instance need go no further than the title of the person under whom they both claim," but say the court, continuing, "the defendant may set up a title adverse to that of such person, and if he does the plaintiff must show such title to be invalid, or produce some superior title or fail." The defendants here have, in our opinion, successfully set up a title adverse to that of the party under whom they both claim, to wit: the title growing out of the incumbrance created by the mechanics' lien, in *Anthony v. The Foyes*, and the sheriff's deed consequent upon the judgment and sale. In consequence of these views and this opinion, we hold that the court below committed no error which this court can or should review, reverse or modify in this proceeding, and therefore we are of opinion to affirm the judgment of the court below in all respects, but without the five per cent. allowed in cases of mere dilatory proceedings brought here by writs of error.

Judgment affirmed.

Opinion of the Court—Peck, J., dissenting.

PECK, J., dissenting.

The writ of error was issued to the judge of the second judicial district court, as sitting in and for the county of Uinta: recited that in the record, proceedings and rendition of a judgment in a cause in that court existing before him, between these parties, error was alleged to have been committed; and directed that judge to send up a transcript of the record and proceeding of the judgment: the writ has been answered by the sending up of a transcript under the certificate of J. W. Meldrum, who certifies as the clerk of that court, as a court sitting in and for that county; and that the transcript is complete as to all the proceedings lying in that court; and attaches to his certificate what purports to be the seal of that court for that county. The transcript could be sent up only by the judge of the court wherein the originals lie, as he alone has their custody: hence the writ must issue to that judge. The proceedings narrated in the transcript, purport to have transpired in the second judicial district court, sitting in and for Uinta county. The second judicial district could embrace it only under the act of December 15th, 1877, entitled, "An act to provide for the organization of Crook and Pease counties, and to provide for holding courts therein"—page 34 of the Laws of 1877. The statute assumes to provide for annexing to the latter district the counties of Uinta and Sweetwater, which at its passage constituted the third district; and for the formation of Crook and Pease into a third district: and could have no effect to extend the second district over Uinta and Sweetwater, or over either of them, until the new district had been organized: it has not been organized, nor, because the act is void, can it be organized. Hence in either view the second district does not embrace Uinta county; its files and records do not lie in the court of that district; the clerk of that court could not certify up a transcript of them; its seal could impart no verity to the transcript, and the issuance of the writ to its judge was a

Opinion of the Court—Peck, Jr., dissenting.

nullity, and there was no second judicial district court, judge, clerk or seal for Uinta county. My reasons for this result are particularly stated in the case of *H. Garbanati* against *Beckwith & Co.*, decided at this term.

As this defect in the writ and its return is jurisdictional and patent, it is not cured by the fact, that it has not been objected to by either party on the hearing: and if the matter stops here, we must dismiss the proceedings of our own motion. But the omission to object, and the treatment of the case as regularly before us are a waiver of the issuance of a proper writ, and of a return to it with a certified transcript, and are equivalent to a formal consent filing of the present transcript, dispensing with a proper writ, return and certificate—a thing which may undoubtedly be done, as a sufficient substitute. This brings us to the merits of the judgment, which appears in the transcript, and of which a review is sought here.

Lee sued Cook and Corey in ejectment in common form for lot No. 8, situate in block No. 4, in the town of Evans-ton, and county of Uinta, and for the rents and profits; alleging the seizin in fee to be in himself, and a wrongful possession in them: they answered, admitting possession to be in themselves, and denying the residue of the petition. The case was tried by the court without a jury, and judgment rendered for the defendants. There was no conflict in the evidence, and the only question was, and is, as to the legal effect of the facts which resulted from it. They are as follows: A. L. Foye and Amanda E. Foye executed to Lee a deed in fee simple of the premises, which was acknowledged and recorded on November 15th, 1875, was in due form, and sufficient to convey to him whatever estate they then had in them; at and for a considerable time prior to the conveyance, they were in possession of the premises, as in their own right, she as owner, he inferentially as husband; and in pursuance of the conveyance he succeeded them in the possession. On the 17th day of July, 1875, one Anthony recovered a judgment against the

Opinion of the Court—Peck, J., dissenting.

Foyes in the same court, which was entered in the following words: "It is ordered and adjudged that John W. Anthony, have and recover of A. L. Foye and Amanda E. Foye, his wife, the sum of \$134.30 and costs taxed at and it is further ordered that, unless said amount be paid within 20 days, the sheriff advertise and sell the property covered by lien; and that the sheriff conform as nearly as may be in the sale of said property, to the law regulating the sale of real estate on execution." The record in that case also shows that at the January term of that court for 1876, Lee moved to set aside the sale herein, and the court, having heard said motion read, and the arguments of counsel having been had, it is ordered that said motion be overruled: and that later in the term on an *ex parte* motion by Anthony, the sale was confirmed. The pleadings in the suit were not shown; nor was there anything to indicate that it was for a lien, except the caption of an affidavit for a continuance, which was in the record that was produced to prove the judgment, the captions of the proceedings of several days that were set forth in it, and the judgment. The sheriff executed and delivered to Harvey Booth on the 29th day of April, 1876, a deed of the premises, which recited that by virtue of an execution, dated November 13th, 1875, and issued from and under the seal of the third judicial district court for Uinta county upon a judgment rendered in that court on the 17th day of July, 1875, in favor of John W. Anthony against Arnold L. Foye and Amanda E. Foye, said judgment being to satisfy a mechanic's lien, filed against the real estate of the said Foyes, and recorded in Book A, at page 827 of the Uinta County records on the 20th day of September 1873, said execution being directed and delivered to said sheriff, commanding him to make out of the property of the judgment debtors certain moneys in the writ specified, he, the sheriff, did in obedience to the writ levy on all the estate of the debtors in lot No. 8 in block No. 4 in the town of Evanston and county of Uinta; and on the 27th day of Decem-

Opinion of the Court—Peck, J., dissenting.

ber 1875, sell that estate at public vendue in front of the court house in the county, between nine o'clock in the forenoon and five o'clock in the afternoon, having given notice of the time and place of sale by advertising the same according to law, to Booth, as the highest bidder; and that on the sheriff's return of the sale to said court it was confirmed by the latter at its January term for 1876; and which deed then purported to convey to Booth in fee for the price of the sale, and which was specified in the instrument, all the estate belonging to the Foyes in the premises on the 20th day of September 1873, or at any time afterward, or at the execution of the deed, as fully as he, the sheriff, could convey the same under the writ and the statute. Booth took possession under the deed against the will of the plaintiff; the defendants entered under Booth before the commencement of the action—continued in possession against the plaintiff's demand for it—and were so in possession up to and at the commencement of the action.

The legal result of these facts is simple. Both parties claim under the same—the Foye title; between them it stands as good, and the only question is—which of them get it; the defendants claiming under a title, which, if derived, commenced in a judgment lien that was senior to Lee's deed; for, disconnected with that lien, their attempt to obtain title could commence only in the levy,—there is no evidence that this preceded the delivery of the Lee deed,—and in that case his deed would prevail.

The first suit was to establish a specific lien upon land by a judgment *in rem*, and such a judgment should have consisted of three things: it should have ascertained the amount due the plaintiff as the lien holder, as an absolute debt, to that extent, and in that respect would have been a general and absolute money judgment; should have identified the property which was subject to the lien, and charged the claim upon it; and then have ordered the proper process for executing the claim upon the property. The creditor could then have had an execution, which following the

Opinion of the Court—Peck, J., dissenting.

judgment, would have run specifically against the lien-property: that exhausted, and leaving a *deficit*, he could have had an execution running generally against property subject to process; or, the lien branch of the judgment being but collateral to the rest of the judgment, he could have had a general execution in the first instance,—resorting if necessary, to the lien or special feature of the judgment afterward.

The present judgment does not determine the lien property, but leaves its determination to the sheriff, as a lien judgment is inchoate and a nullity. As a general money judgment it is valid, and stands as if the court had only attempted to render such a judgment; for, though the costs have not been inserted in it, the creditor could waive them.

Can the sheriff's deed be sustained under this general judgment? A title obtained by an official statutory sale, is a matter of strict right, and no essential ingredient can be supplied by presumption; because the sale is arbitrarily regulated and conditioned by, and depends for its validity upon the observance of the statute—is involuntary, easily susceptible of abuse, and, if the statute has been pursued, the party who claims the title is supposed to be always able to show the fact. A valid sale of land under this judgment must, according to the statute, have been made upon a duly issued execution in the absence of personal property subject to process and sufficient to satisfy it, upon the written return of an appraisement, made on actual view by three sworn householders resident within the county, wherein the land was situate, the return to be deposited by the sheriff in the clerk's office of the court whence the process issued—at not less than one half of the appraised value—on a thirty days notice of sale, given by advertisement in a newspaper printed in the county, or, none being so printed, in one of general circulation therein; and unless otherwise ordered by the court, by posting at the door of the court house within the county, or there

Opinion of the Court—Peck, J., dissenting.

being none, at the door of the house where the district court was last held, and by posting in five other places in the county, two of which were within the precinct of the land,—the sale to be at the door of the court house. Comp. Laws, p. 88, sec. 429; Ib. p. 91; secs. 438, 440, 442, 449. These intermediate links were necessary to connect the deed with the judgment, and validate it. If the present sale followed these conditions, the process, appraisement, notice, sale, their necessary accompaniments, and the officer's return, all showing them, should have appeared upon the files of the court. At the common law the affirmative of this proof rested on the defendants, in order to make out their claim of title under the judgment lien. If the deed could have supplied it, it does not. That recites that the sale was made under an execution issued upon the judgment; does not set out the process, and is only the sheriff's legal opinion on the subject; does not show a necessity for resorting to the land by the want of personal property; indeed, indubitably indicates that whatever process he acted under, was issued and was used by him to satisfy the judgment only as a special lien judgment *in rem*; contains no hint that an appraisement had been made; and its recital that the sale was made, "after having given notice of the time and place of sale, by advertising the same according to law," is but his legal opinion of the matter.

Did Lee's motion in the *Anthony* and *Foye* case, to vacate the sale, and the overruling of it, or the subsequent motion for, and order of confirmation, or the Compiled Laws at page 92, and section 444, relieve the defense of this burden of proof? Treating the denial of the first motion as a final order, and construing it as a final adjudication—and this is considering it most favorably for the defense—it could not cut off Lee's right to future resistance to the sale, unless that would be the necessary result of the order. If it was conceded on the hearing that he had the title, unless the sale was regular under the general or the supposed special lien, the only question, to be decided, was as to the regu-

Opinion of the Court—Peck, J., dissenting.

larity of the sale, and it may be hypothetically allowed that the order cut off that right of resistance; but his claim of title may have been opposed irrespectively of the merit of the sale as to regularity; he would then have stood stronger, and been within standing in court to contest in that suit the sale, because his title could only be established in a separate suit, and upon an issue framed for the purpose; and in that state of the motion there would have been nothing left for the court, but to dismiss the motion, and it must be considered as having denied it accordingly: the record is equally consistent with the latter, as it is with the former alternative; and that right of resistance was not cut off.

The order of confirmation. It was made on an *ex parte* motion: Lee had been cut off from again appearing; neither of the Foyes had an interest in appearing, and neither of the three appeared: so that the order did not affect that right of resistance.

Section 444. It declares that "the deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved * * * and * * * shall recite the execution, or the substance thereof, the names of the parties, the amount and date of the judgment, by virtue whereof" the land was sold. The deed, intended by this provision, is to establish *prima facie* the legality of the sale, and so shift the burden of impeaching the latter to the opposite party: to have this effect, must contain the prescribed recitals, for they are plainly prescribed as the requisite conditions for that effect. The aim of the section, in providing for recitals sufficient to show these data of the judgment and the tenor or substance of the process, is to make the deed disclose whether the execution issued on and conformed to the judgment. The present deed neither recites the amount of the judgment, nor the tenor or substance of the process, nor indicates what amount was specified in the latter for collection.

The deed is a nullity. As the proofs stand, the Foye

Opinion of the Court—Sener, C. J.

title and possession passed to the plaintiff; he was ousted by the defendants, and should have recovered. The judgment should be reversed, with costs to the plaintiff.

TERRITORY OF WYOMING v. CONLEY.

ACCESSORIES: INDICTMENT.—An indictment, in charging an accessory before the fact, should be as full, complete and specific as in charging a principal, and nothing needed should be embraced by words of reference to the preceding count charging the principal.

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

H. Garbanati, for plaintiff in error.

W. W. Corlett, for defendant in error.

SENER, C. J. This case is brought here by the prosecuting attorney of Uinta county, under sections 146, 147, 148 and 149 of the Criminal Laws of Wyoming, as found in the Compilation of 1876: these sections are quoted entire in the opinion I have read this day, in the case of the *Territory v. Andrew Nelson*, and so need not be repeated here. It seems that one Samuel Hart was indicted in that court for burglary, and that the defendant Conley was indicted as an accessory before the fact. The statute which defines the crime of burglary in Wyoming, is as follows: (Page 254, sec. 38, edition 1876.)

Sec. 38. "Every person who shall willfully and maliciously and forcibly break and enter, or willfully and maliciously without force (the door or any window being open), enter into any dwelling house, kitchen, office, shop, store-house, warehouse, malt house, stilling house, banking house,

Opinion of the Court—Sener, C. J.

hotel, saloon, mill, pottery, factory, water craft, church or meeting house, railroad car, or any other close inclosure, with intent to commit murder, robbery, rape, mayhem, larceny, or other felony; or who, being lawfully within any room or apartment of any of the buildings aforesaid, shall, with like intent, either with or without force, enter into any other room or apartment of the same building, shall be deemed guilty of burglary, and upon conviction thereof, shall be punished by confinement in the penitentiary for a term not less than one year nor more than ten years."

The statute defining accessories, is as follows: (Compiled Laws of Wyoming, page 249, sec. 13.)

Sec. 13. "An accessory is he or she who stands by and aids, abets or assists, or who, not being present aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime. He or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal, and punished accordingly."

The indictment under which Hart was charged as principal and Conley as accessory, is as follows

"TERRITORY OF WYOMING, }
COUNTY OF Uinta: } ss.

At a term of the district court, begun and held at Evanston, within and for the county of Uinta, on the first day of July, in the year of our Lord one thousand eight hundred and seventy-eight, the jurors of the grand jury of the county of Uinta, good and lawful men then and there returned, tried, empaneled, sworn and charged to inquire within and for the body of the county of Uinta, at the term aforesaid, upon their oath aforesaid, in the name and by the authority of the Territory of Wyoming, do present and find that Samuel Hart, late of the county aforesaid, on the 16th day of January, in the year of our Lord one thousand eight hundred and seventy-eight, with force and arms at the county aforesaid, a certain close inclosure, known as a hand-car house of the Union Pacific Railroad Company,

Opinion of the Court—Sener, C. J.

there situate, then and there feloniously, willfully, maliciously, forcibly and burglariously did break and enter, with intent, then and there the goods and chattels of the said Union Pacific Railroad Company, then and there feloniously and burglariously to steal, take and carry away; and that he, the said Samuel Hart, in the said hand-car house, 3 shovels, 1 pick, 1 adze, 1 buggy bar, and 2 chisels, of the value of twelve dollars, of the goods and chattels of the Union Pacific Railroad Company in the said hand-car house then and there being found then and there burglariously did steal, take and carry away, and the jurors aforesaid, upon their oath aforesaid, do further present that C. A. Conley, late of the county aforesaid before the said burglary and larceny was committed in form aforesaid, to wit: on the said 16th day of January, 1878, with force and arms at the county aforesaid, did unlawfully and feloniously advise, encourage, counsel, aid, abet and procure the said Samuel Hart to do and commit the said burglary and larceny in manner and form aforesaid; against the peace and dignity of the Territory of Wyoming.

H. GARBANATI,
Prosecuting Attorney for said Uinta County."

The defendant Conley demurred to the indictment in the court below and the court held the indictment insufficient in law. The prosecuting attorney took exception to the court's ruling and has brought the case here properly. The court, after inspecting the record, thinks the questions raised ought to be passed upon, and proceeds to do so. The question raised was: was the indictment sufficient to charge Conley as accessory before the fact to the crime of burglary. We think it was not, and the court below acted properly in sustaining the demurrer which was interposed to it. In our opinion the indictment was defective, and so insufficient in law, for the following reasons:

1st.—In that it did not charge Conley as principal, either directly or by force of the statute making him a prin-

Opinion of the Court—Sener, C. J.

cipal. The case of *Baxter v. The People*, 3 Gilman (Ill.), is, we think persuasively conclusive by its reasoning—the statute is almost “*totidem verbis*” our statute in regard to accessories; the only difference is that our statute has the words “hath advised and encouraged,” while the Illinois statute has it “hath advised or encouraged,” etc. The Illinois decision says that the words, “deemed and considered,” are equivalent to saying, “are hereby declared to be;” we concur in the reasoning and results of that decision. The court there says, and we accept its declaration, that in indicting an accessory as principal, it would be advisable to describe the circumstances of the offense as they actually transpired, as it is in an indictment at or before the fact, but if the stating part be that way the conclusion should be for the actual offense of which the principal is charged, for that is really the offense of which the accessory is guilty, if at all.

2d.—It failed to charge the specific felony intended to be committed, or that any was committed by Conley. In burglary it is usual, and approved, to charge an actual larceny, because, if the testimony should fail to sustain the burglary, *i. e.*, the breaking and entering, the defendant may be held for simple larceny, and an indictment so charging has been held good, though on examination, the allegation is found defective. *Vide* 8 Cal., 579; *State v. Lockhart*, 24 Geo., 420; 2 Bishop’s Criminal Procedure, 2d edition, secs. 142 and 143 and cases there cited.

3d.—The indictment as to Conley failed to charge that the property was feloniously taken. The burglarly is incomplete without the intent to commit larceny. To constitute larceny the intent must be felonious: all the authorities agree upon these points.

4th.—As to Conley the indictment failed to allege ownership of the “hand-car house.” This is essential, 2 Bishop’s Criminal Procedure, 2d edition, 187.

It was objected in the argument that the words, “hand-car house” could not be included in the words, “or any

other close enclosure.” We think this objection not well taken, but we do think that in charging an accessory before the fact as principal and in the manner we have pointed out, that the count in the indictment so charging such accessory, should be as full, complete and specific as in charging the principal, and that nothing needed should be embraced by words of reference to the preceding count. An examination of the indictment in Conley’s case shows that this was not done, but he **was** charged in vague and general terms as an accessory.

Such pleading is not only not permissible, but in criminal cases not only not justifiable, but not to be tolerated. We are therefore, for the reasons stated, clearly, of opinion that the court below, because of the defects stated in the count charging Conley as an accessory before the fact in the burglary alleged to have been committed by one Samuel Hart, acted properly in sustaining the demurrer interposed by the said Conley to the count in the indictment, which charged him as an accessory before the fact; because clearly the count charged no criminal offense in such legal form as the court upon a conviction could have rendered judgment, or as would have authorized a conviction of the said Conley as an accessory before the fact to the crime of burglary alleged to have been committed by the said Samuel Hart.

Judgment affirmed.

PECK, J. dissenting.

This is a transcript of the case below, including a bill of exceptions filed here by the prosecuting attorney of Uinta county under sections 146, 147 and 148 of the criminal code, at pages 157 and 158 of the compilation. Sections 148 and 149 at page 158 require that we shall render a decision on the question so presented, our decision not to affect the judgment rendered below; but to determine the

Opinion of the Court—Peck, J., dissenting.

law, which shall govern similar cases, pending and to arise. If the record discloses that the court below exercised, but did not possess, jurisdiction, it raises in law an exception, which is as perfect as if it had been formally excepted, irrespective of the assent or dissent of the parties to the assumed jurisdiction; and these exceptions should be decided first. The transcript certified to this court from Uinta county, and by the clerk of the second judicial district court, as a court of that county, and under a seal inscribed as a seal of that court for that county, and as a copy of the record in this case of that court, as sitting in that county, and all the proceedings, which are set forth in the transcript, are therein described as having transpired in and before that court, as a court of and sitting in the county. It was held by the Hon. J. B. Blair, the second judicial district court could sit in the county of Uinta only—if at all—under the act of December 15, 1877, entitled, "An act to provide for the organization of Crook and Pease counties, and to provide for holding courts therein"—page 34 of the laws of 1877. The statute assumes to provide for annexing to the second judicial district the counties of Uinta and Sweetwater, which at the time of its passage constituted the third judicial district, and for the organization of Crook and Pease counties into a new third judicial district; the statute could not take effect to extend the second judicial district over Uinta and Sweetwater counties, or either of them, until the new third judicial district had been organized; and it has not been organized, nor could it be organized, because the act is void. Hence, in either view the exercise of jurisdiction in the case by the second judicial district court was void. My reasons for this result upon the subject of jurisdiction are particularly stated in my opinion delivered in the case of H. Garbanati against Beckwith & Co., which was argued and decided at a prior date of this term. I also refer to that opinion as showing that the judge who held the court below was incompetent to hold it aside from the fact that the second judicial district

Opinion of the Court—Peck, J., dissenting.

court could not be held in Uinta county. As the statute aims to record the decision of this court upon every question presented by the record, it is necessary to examine whatever exception was taken to the action of the district court as based upon the theory of existing jurisdiction. The record states that at a July term held by that court in 1878, an indictment was found against Samuel Hart and C. A. Conley, the charging part of which is in the following words: "That Samuel Hart, late of the county aforesaid, on the 16th day of January, A. D. 1878, with force and arms, at the county aforesaid, a certain close enclosure known as a hand-car house of the Union Pacific Railroad Company, there situate, then and there feloniously, willfully, maliciously, forcibly and burglariously did break and enter with intent then and there the goods and chattels of the said Union Pacific Railroad Company then and there feloniously and burglariously to steal, take and carry away; and that he, the said Samuel Hart, in the said hand-car house, 3 shovels, 1 pick, 1 adze, 1 buggy-bar and 3 chisels, of the value of twelve dollars, of the goods and chattels of the said Union Pacific Railroad Company, in the said hand-car house, then and there being found, then and there burglariously did steal, take and carry away. That C. A. Conley, late of the county aforesaid, before the said burglary and larceny were committed in form aforesaid, to wit, on the 16th day of January, 1878, with force and arms, at the county aforesaid, did unlawfully and feloniously advise, encourage, counsel, aid, abet and procure the said Samuel Hart to do and commit the said burglary and larceny in manner and form aforesaid, against the peace and dignity of the territory of Wyoming." Conley demurred to the indictment as not alleging facts sufficient to constitute a crime or offence. The district court gave judgment for Conley upon the demurrer and discharged him; to this judgment the prosecuting attorney for the county excepted, and we have only this further exception to consider. To be good against Conley for burglary, the indictment must have been good against Hart for burglary;

Opinion of the Court—Peck, J., dissenting.

though it might have been good against the former for larceny, and not have been good against the latter for larceny. It was found under section 38, at page 254 of the compilation, which declares that "every person who shall willfully, maliciously and forcibly break and enter any dwelling-house, kitchen, office, shop, storehouse, hotel, mill, saloon, pottery, factory, water-craft, church, meeting-house, railroad car, *or any other close enclosure*, with intent to commit murder, robbery, rape, mayhem, larceny or other felony, shall be deemed guilty of burglary, and upon conviction thereof shall be punished by confinement in the penitentiary for a term of not less than one nor more than ten years."

It is claimed that the indictment is bad because no burglary can be committed in the kind of enclosure described in it. That enclosure is a hand-car house, and must be covered—if at all—by the words of the statute, "or any other close enclosure." The proposition is based upon the rule of statutory interpretation, that when particular words are followed by general ones, or if, after an enumeration of several classes of persons or things, there is added, "and all others," the general words are restricted in meaning to objects of like kind with those specified. We assent to the rule as correct. By it, under the 29 Car. 2, ch. 7, sec. 1, providing that "no tradesman, artificer, workman, laborer, or other person whatsoever," should exercise his calling on the Lord's Day, the words other person were held not to include a farmer, he not being a person of like denomination with those specifically enumerated, the court reading "other person" to mean "other like person," and interpreting the words, "workman, laborer" in the enumeration in their ordinary acceptation, as signifying a laboring employé. By it, also, a statute which designated by the words, "wherry, lighter, or other craft," was interpreted to mean by "other craft," "other like craft," and so not to embrace a steam-tug. Bishop on Stat. Cr., 245-7; B. & C., 596. *Regina v. The Inhabitants of Whitnash*, 23 Law Times, 156 *Regina v. Reed*.

Opinion of the Court—Peck, J., dissenting.

But the reason for the rule is said to be that the particular words were intended to govern, because they were employed; but it is as consistent to say that the general words were intended to govern because they were employed; so that the reason works equally as well in each way, and nullifies itself; in truth, the rule is an assumption—a key invented for an otherwise doubtful text. Between two interpretations, the narrow and the broad, rejection having become necessary, adopting the former as the safest; it is arbitrary, artificial, and easily susceptible of abuse, and not to be followed against the plain sense of the statute. Therefore, if it is clear that the statute intended by general terms to enlarge the class of persons or things specified in the preceding enumeration, it must so operate against a defendant, though a penal statute. We are satisfied that section 38 comes under this last stated rule; every locus contained in the specific enumeration is an enclosure, and unless a door or window is open, is required by the term “close” in the general clause, “other close enclosure,” to be a close one; and the enumeration is expounded by the term “other” in the clause to any close enclosure; and thus the general clause both limits and enlarges and so defines the enumeration—is essential and cannot be rejected. This objection is unsound. It is claimed that the indictment is bad, because it does not allege the ownership of the hand-car house. It describes the locus, in connection with the breaking, in these words: “*A certain close enclosure, known as a hand-car house, of the Union Pacific Railroad Company, there situate.*” The preposition “of” denotes ownership; in standard language, signifies “belongs to,” “property of,” so that the indictment does directly allege the ownership of the locus in question; and it so alleges it according to the established form of an indictment for burglary. This objection is unsound.

It is claimed that the indictment is bad because it fails to allege that the breaking and entering were done with the intent to commit a specific felony or that any felony was

Opinion of the Court—Peck, J., dissenting.

committed. At the common law burglary consists of four things: time, place, manner and intent; the night, a dwelling house, entry by breaking, and entry with the intent to commit a felony. In respect to the fourth element, the established rule for alleging the intent of the entry, is to state it in one of three ways—by stating either that the entry was made with the intent to commit a felony; or that having been made, a felony was committed; or that the entry was made with the intent to commit a felony, and that having been made, a felony was committed; whichever method is pursued, setting forth sufficient facts to constitute a given felony. I speak of this as the established rule, because sound practice observes it. In connection with this rule, Mr. Archbold furnishes the following form: “The jurors present that A. B., on, &c., in the night, the dwelling-house of C. D., situate in &c., feloniously and burglariously did break and enter with intent the goods and chattels of the said C. D., in the said dwelling-house there being, there in said dwelling-house feloniously and burglariously to steal, take and carry away. And the said A. B., there in said dwelling-house, one &c.,” (enumerating articles), “of the value of five pounds,” of the goods and chattels of the said C. D., in the said dwelling-house there being found, there feloniously and burglariously did steal, take and carry away, against, &c.” The form follows the third method, which is stated in the rule, and is a common law form; and hence the allegation, “with intent the goods and chattels of the said C. D., in the said dwelling-house there being, there in said dwelling-house feloniously and burglariously to steal, take and carry away,” specifies no value for the property intended to be stolen, and yet shows an intent to commit a felony by committing a larceny, because at common law every larceny is a felony, the distinction into grand and petty larcenies going to punishment, not to the denomination of the offense. It is true that the next succeeding allegation in the form of a larceny committed specifies the value of five pounds for

the property stolen; but Mr. Archbold appends a comment upon this specification to the effect that its object is to secure a conviction for larceny, committed upon property of that value—evidently under a statute—in case of a failure to convict for the burglary; and adds that if the value be under that amount, it need not be stated, clearly showing that it is not specified in the form as necessary to setting forth a felony committed by committing larceny, but to secure a separate conviction for larceny—a conviction for a five pounds larceny; and it must be borne in mind that the purpose of alleging the intent of entry in both ways, namely, by alleging an entry with the intent to commit a larceny, and by alleging an entry and a larceny committed, is to secure a conviction for larceny, the indictment failing as to burglary. Burglary is a felony at common law. Section 38 creates a statute burglary out of common law burglary by enlarging the elements of time and place, and having enlarged the elements of entry and intent of entry in the latter offense. Coupled with this section are sections 42, 43 and 44, on page 255 of the compilation, which sections declare: “SEC. 42. Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another, and from a house in the day time, shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt, or any instrument of writing of value to the owner. Every person convicted of larceny, shall be punished by confinement in the penitentiary for a term not less than one year, nor more than ten years.

SEC. 43. When the property taken is of the value of twenty-five dollars, or when taken from the person of another, of whatever value, or when taken from the sleeping apartment of another in the night time, of whatever

Opinion of the Court—Peck, J., dissenting.

value, shall be grand larceny. Larceny in other cases shall be petit larceny.

SEC. 44. Every person who shall be guilty of petit larceny, shall be punished by a fine of not more than one hundred dollars, nor less than five dollars, or by imprisonment in the county jail not more than six months, nor less than one month, or both, in case of conviction of a second offense, in the discretion of the court. Justices of the peace shall have concurrent jurisdiction with the district court in all cases of petit larceny." Section 42 enlarges common law larceny, but defines it as a felony; the residue of the section and sections 43 and 44 divide the offense into grand and petty larceny, and grade the punishment to the division; the three sections thus leaving all larceny felony, as it is at the common law. Consequently if the intent of felony with which the entry was made, is to be set forth by alleging an entry with an intent to commit a larceny, or an entry with a larceny committed, or both ways, it would be unnecessary under these four sections to specify a value for the personal property; it would suffice to set forth the intent, or the fact of larceny as at the common law. These four sections belong to the act of December 10, 1869, and so the law stood until the act of December 5, 1873, which declares that all crimes punishable by death or by imprisonment in the penitentiary shall be felonies, and all other criminal offenses misdemeanors. The latter act was in force when this indictment was found; and controls the prior act, and the common law, so far as to require that, in setting forth a larceny, as a felony, with the intent to commit which the entry was made, or which was committed after the entry was made, the allegation shall show one of three things: either that the property taken was of the value of twenty-five dollars or more, or that it was taken from the person of another, or that it was taken in the night from the sleeping apartment of another; for only these three last mentioned forms of taking are punishable by imprisonment in the penitentiary under said sec

Opinion of the Court—Peck, J., dissenting.

tions 42 and 43, and under the statute of December 5, 1873 they only are felonious larcenies, all other larcenies being misdemeanors: and therefore if the allegation showed less it would not set forth a felony. According to this test the present indictment fails, as an indictment for burglary; it attempts to allege that the entry was made with the intent to commit a larceny, but does not set forth an intent to commit a grand larceny; the allegation suffices if at all for the common law, not for the statute; its attempted allegation of a larceny committed after the entry is of a petty larceny; and therefore if sufficient for that, could not aid the charge of burglary—could save only for a conviction for larceny in case of a failure to convict for burglary. This objection is sound. It is claimed that the indictment does not charge larceny as a principal either directly or by force of the statute. The proposition is founded on section 13, at page 249 of the compilation of said act of 1869, which declares that an accessory before the fact “*shall be deemed and considered a principal and punished accordingly;*” and the proposition treats the act as providing that such accessory shall be prosecuted, and therefore indicted as principal.

The indictment is framed at common law against Conley, as an accessory of Hart; and in that respect is good against him at common law, if sufficient as against Hart; and the legal effect of the facts, set forth as to Conley, show that under the statute he was a principal. If section 13 intends that an accessory shall on the face of the indictment be in form charged as a principal, the present indictment does not conform to the statute; but the defect is of form not of substance; the demurrer simply complains that the indictment does not allege facts sufficient to constitute an offense, and goes only to substance, and does not reach the supposed defect. To have reached that, Conley should have demurred either specifically for the alleged defect, or generally in the established form of a demurrer to an indictment,—“the said defendant in his own proper person cometh into court here,

Opinion of the Court—Peck, J., dissenting.

and, having heard the said indictment read, saith that the said indictment, and the matters therein contained, in manner and form, as the same are above stated and set forth, are not sufficient in law, and that he is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, &c.”; not having so demurred, the point in question is not raised, and the construction of the section not necessitated.

It is claimed that the indictment does not charge the commission of a larceny, because it does not allege that it was feloniously committed. At the common law larceny is generic and specific; its generic name is felony, its specific larceny; it consists of two elements, one a trespass upon the property of another, one the motive of the trespass, which motive is the *animus furandi* or the purpose of stealing that property—that is, of so taking it, as to deprive the owner of his entire ownership of or interest in the property; in the description of the offense the words, “to take and carry away,” signify the trespass; and the word, “feloniously,” the intent—and all standard authorities agree that the intent can be expressed by no other word or combination of words—that no periphrasis will serve as a substitute for it; hence the definition of larceny is, “the felonious taking and carrying away of the personal goods of another;” and in the allegation of the offense “feloniously” must be used to characterise the taking and carrying away—as that A. B., the defendant, “feloniously took and carried away.” It is true that the verb “to steal,” is also usually employed in the allegations, as “feloniously stole, took and carried away;” but adding the verb “stole,” or “to steal,” will not dispense with the adverb “feloniously,” because the latter expresses the very fact of the intent, and no more; while “stealing” and “larceny” are synonymous, as are “to steal” and “to commit larceny,” and each expression is a mixture of fact and law; hence it is prudence that suggests, not principle, that requires the use of the verb “to steal” in setting forth larceny in an indictment.

Opinion of the Court—Peck, J., dissenting.

Petty larceny is, under the statute, misdemeanor; but changing the denomination of the offense from felony to misdemeanor, from larceny to something else, leaves its nature and its elements, and consequently the rule of pleading the same. The allegation in this indictment of the commission of a larceny, omits the word "feloniously," as to Hart, and merely charges him with trespass. Having so charged him, had it proceeded to allege that Conley "feloniously" procured Hart to take and carry away, and "feloniously" aided him in "taking and carrying away" the personal property, on which the latter committed the trespass—it would have charged Conley with the commission of a petty larceny, through or with the aid of Hart as a trespasser; the indictment would have been faulty in form, but good in substance. This is not however what it does; having so charged Hart with a trespass, it alleges that Conley "feloniously" procured and aided Hart to commit "said larceny," referring to a larceny as previously set forth, but no larceny is previously set forth, so that the word "said" connects Conley with nothing, and the indictment fails as to him in respect to larceny. The objection is sound.

A decision should be entered that the second district court had no jurisdiction in the case; but that had it possessed jurisdiction, its judgment on the demurrer would have been correct.

Statement of Facts.

TERRITORY OF WYOMING v. NELSON.

PROSECUTING ATTORNEY : EXCEPTIONS.—Under the laws of this Territory, the prosecuting attorney may take exceptions to any opinion or decision of the court, during the prosecution of the cause, which he may think erroneous.

STATUTES: CONSTRUCTION.—Where a statute directs the doing of a thing for the sake of justice or the public good, the word “may” will be construed to mean “shall.”

IDEM.—Section 1895 of the Revised Statutes of the United States provides : “Any person convicted by a court of competent jurisdiction in a territory, for the violation of the laws thereof, and sentenced to imprisonment, may at the cost of such territory, on such terms and conditions as may be prescribed by such rules and regulations, be received, subsisted and employed in such penitentiary during the term of his imprisonment, in the same manner as if he had been convicted of an offense against the laws of the United States.” *Held*, that the word “may” used in the statute means “shall,” and that the penitentiary at or near Laramie City, erected by authority of the laws of congress, is the only penitentiary for the confinement of persons convicted in the several district courts of this Territory, for offenses against the laws of the Territory, and the punishment for which is by territorial statutes, prescribed to be confinement in the penitentiary, unless congress shall otherwise legislate.

ERROR to the District Court of Albany County.

This case comes from the district court of Albany county; the case was tried at the February, 1880 term, at Laramie City, in said county.

Andrew Nelson, the defendant in error, was regularly indicted by the grand jury of said county, for the crime of “knowingly killing neat cattle not his own,” was regularly tried on said indictment, found guilty by the jury and his term of imprisonment in the penitentiary at six months.

Whereupon the prosecuting attorney of Albany county moved the court for sentence of said Andrew Nelson to the penitentiary near Laramie City, that being the only penitentiary known and established by the laws of Wyoming within the said Territory.

The court overruled this motion, and over the objection of the said prosecuting attorney and on its own motion pro-

Argument for Plaintiff in Error.

ceeded to sentence the said defendant Andrew Nelson to the state penitentiary in Lincoln, in the state of Nebraska. Which said sentence the prosecuting attorney of Albany county deeming to be unlawful, erroneous and absolutely void, presenting his bill of exceptions, setting forth in substance the above facts, which was signed by the court below and permitted to be filed in this court, under secs. 146-149 of the Criminal Code.

M. C. Brown, for plaintiff in error.

That the legislature can only enact laws having force and validity within certain territorial limits. See secs. 1 and 4, Organic Act. See also, Cooley's Const. Lim., p. 128; Bishop's Crim. Law, vol. 1, p. 120 and 122.

That the judicial authority is no broader than legislative. See Organic Act, sec. 9; Cooley's Lim., page ; *Ableman v. Booth*, 3 Miller U. S., 145; Bishop Crim. Law, 120; also 79-81, and 84. The mittimus is void on its face because it directs the officer in charge of the defendant to convey the said Andrew Nelson to the state penitentiary at Lincoln, in the state of Nebraska, a place beyond the limits of Wyoming, and a penitentiary over which the courts of Wyoming have no control. Laws cannot have extra territorial force. See Cooley's Con. Lim., 128, and other authorities there cited. That a law attempting to authorize transportation for crime is subject to constitutional objection. See sec. 16, Organic Act; Article 8, Constitutional Amendments, U. S.; Cooley on Con. Limitations, page 329, and authorities there cited; Bishop Crim. Law, secs. 718, 711, *et seq.* No authorities are necessary to show that a sentence of transportation, when not included in the penalty for the violation of a particular statute, is absolutely void.

W. W. Corlett, for defendant in error.

The legislation of the territory in respect to the confine-

Argument for Defendant in Error.

ment of persons convicted of felony, does not authorize any court to sentence such persons to the penitentiary at Laramie City. Hence the motion of the prosecuting attorney was properly overruled, and his exception was not well taken. Comp. Laws of Wyo., 496, 568, 569. Sess. Laws, 1877, p. 87; Sess. Laws, 1879, p. 142.

The exception having been taken to the action of the court upon two propositions, and being right as to one of them, is not well taken.

The law of the Territory as it now stands, provides that a person convicted of crime shall be transported out of the Territory for imprisonment. This is an inherent right in government, unless it has divested itself of the right. 1 Archbold, C. P. & P., p. 687. And so perfect is this right that express constitutional inhibition is necessary to take it away. See charters and constitutions of the various states of the union, pp. 78, 156, 631, 1215, 1295, 1420, 1466, 1647, 1695, 1825, 1877, 1995.

The doctrine that a statute has no extra territorial force or operation is restricted by the qualification that it may and frequently does have effect in a foreign jurisdiction—not *propria vigore*, but by comity. See Rev. Stat. U. S., secs. 4079-4098.

A corporation created by one state, and thus dependent for its very existence upon the law of the place where created, may act and do business in another state, unless prohibited by such other state from doing so, and may even acquire constitutional rights in the latter state. This could not be the case except by a recognition of the law creating the corporation, and by giving it force and effect beyond the limits of the state enacting the law. *Ins. Co. v. Morse*, 20 Wal., 445; *State v. Doyle*, 40 Wis., 184; *Doyle v. Ins. Co.*, 4 Otto, 537; *Brown v. People*, 75 N. Y., 437.

Again, the state governments have no jurisdiction over places ceded to the United States, and yet it has always been conceded that the state ceding such places might serve its civil and criminal processes within such places, with the

Opinion of the Court—Sener, C. J.

consent of the Federal government. 1 Kent's Com., p. 429, *et seq.* The place of execution of a sentence in a criminal case was not, at common law, a necessary part of the sentence, and as we have seen, the statutes of England providing for transportation beyond the seas, did not name the place of imprisonment. 4 Blackstone's Com., p. 404. No express decision on the precise point in this case has been found, but as it has long been the practice for the states and territories to send prisoners to another jurisdiction for safe keeping, the absence of any decision holding such a practice to be unlawful, affords a strong reason for believing such legislation to be valid. It is the constant practice to send insane persons from one jurisdiction to another for safe keeping in an asylum. If that may be done as to a person who is merely unfortunate, surely the same thing may be done as to a criminal. See Com. Laws of Wyo., p. 280. If a court order a prisoner to be imprisoned in a particular place, the confining the prisoner in any other place would be false imprisonment. 1 Bis. on Crim. Pro., sec. 888. An error in the sentence of a criminal court as to the place of imprisonment cannot be reviewed on *habeas corpus*, the criminal court having jurisdiction to determine the question before it. *People v. Keeper of Penitentiary*, 37 How. Pr., 494, S. C.; 1 Brightly's Digest, p. 1922. Although no precedents have been found which are directly in point upon this case, yet the supreme court of the United States in the case of *ex parte Kaistendick* have recognized and enforced a principle which completely and fully sanctions the legislation now questioned, and sustains the judgment of the court below in this case. *Ex parte Karstendick*, 3 Otto, 396.

SENER, C. J. This case has been docketed for hearing here by leave of the court, under and by virtue of secs. 146, 147, 148, 149, of the Criminal Code of Wyoming, as found on pages 157 and 158 of the edition of 1876. These sections thus referred to are as follows:

Section 146. The prosecuting attorney may take excep-

Opinion of the Court—Sener, C. J.

tions to any opinion or decision of the court during the prosecution of the cause: and the bill containing the exceptions, upon being presented, shall, if it be conformable to the truth, be signed and sealed by the court, which shall be made (be) a part of the record, and be in all respects governed by the rules established as to bills of exceptions in civil cases, except as herein provided.

Section 147. The prosecuting attorney may present such bill of exceptions to the supreme court, and apply for permission to file it with the clerk thereof, for the decision of such court upon the points presented therein; but prior thereto, he shall give reasonable notice to the judge who presided at the trial in which the bill was taken, of his purpose to make such application, and if the supreme court shall allow such bill to be filed, such judge shall appoint some competent attorney to argue the case against the prosecuting attorney, which attorney shall receive for his services a fee not exceeding one hundred dollars, to be fixed by such court, and to be paid out of the treasury of the county in which the bill was taken.

Section 148. If the supreme court shall be of the opinion that the questions presented shall be decided upon, they shall allow the bill of exceptions to be filed and render a decision thereon.

Section 149. The judgment of the court in the case in which the bill was taken shall not be reversed, nor in any manner affected; but the decision of the supreme court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered, or which may afterward arise in the territory.

The court has listened with great pleasure to able and learned arguments on many points growing out of the treatment of the case at bar. To our view, however, there is but one practical question presented for decision, and that necessarily embraces all others. That question narrows to this: What is the penitentiary for the confinement of all persons convicted of any offense against territorial laws,

the punishment of which is confinement in the penitentiary of the territory? Or, as the prosecuting attorney for Albany county puts it, in the motion for the sentence of Andrew Nelson—which having been overruled, brings this question into this court for decision,—Is the penitentiary at, or near, Laramie City, in Albany county of this Territory, the only penitentiary to which persons convicted in Wyoming of felonies under territorial laws, can be sentenced lawfully, for the terms fixed by the courts and according to law? The motion does not of itself clearly show, but the full record, as well as the official position of the prosecuting attorney for Albany county does show that Andrew Nelson was convicted of an offense made a felony by territorial law, and therefore the scope and purpose of the prosecuting attorney's motion was to ascertain the proper penitentiary of the Territory, and have Andrew Nelson sentenced thereto.

The district court of Albany county disregarded and overruled the motion of the prosecuting attorney for Albany county, and of its own motion sentenced the said Andrew Nelson to the Nebraska penitentiary, at Lincoln, Nebraska, doubtless under direction of chapters 80 and 81, of the laws of the sixth legislative assembly of Wyoming, approved December 13, 1879, pages 142 to 146 inclusive.

The act which undertakes to fix and locate "a" penitentiary of this Territory at Lincoln, Nebraska, is as follows: page 142, session laws 1879; section 1. "That the state penitentiary of the state of Nebraska, located at Lincoln, in the state of Nebraska, is hereby declared to be a territorial penitentiary of the Territory of Wyoming, for the confinement of all convicts of said Territory of Wyoming, who have heretofore been sentenced, or may hereafter be sentenced, by any of the courts of said Territory of Wyoming to confinement therein."

Before proceeding to consider the question, or questions, raised in the record, it is proper to notice the point made in the argument by the counsel representing the court below,

or the judge thereof, that the record or transcript as brought here presents no "opinion or decision" for consideration and determination by this court, as contemplated by the statutes hereinbefore quoted. There certainly was a "decision" by the court below when it rendered judgment against Andrew Nelson who was duly indicted, tried, and by a jury found guilty of a felony under the laws of the Territory (which by the territorial law, is required to be punished by confinement in "the" penitentiary), and sentenced him to confinement in the penitentiary at Lincoln, Nebraska. The only question, was it "during" the prosecution of the said Andrew Nelson? If we can determine the meaning of the word prosecution, as used in the statute, we shall have settled this point without more trouble. Referring to Webster's unabridged dictionary, we find this definition of the word "prosecution," under subdivision of definition: "The institution or commencement of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment, on behalf of the state or government, or by indictment or information." And judgment is by the same author defined to be: "The sentence of the law pronounced by the court, or the judge thereof, upon a matter in issue before it." Surely then the judgment rendered in this case was the sentence, and the judgment, being defined to be a part of the prosecution, it was during the prosecution, for during really means "as long as the existence of."

The prosecution certainly existed until it terminated in the final judgment of the court, to-wit: the sentence. This being ascertained, it will follow necessarily that it is not only the right but the duty of this court to pass upon and decide the questions raised by the prosecuting attorney of Albany county, in the court below, and brought here properly for our consideration and determination. It was insisted, however, in argument, that the territorial attorney ought not to be heard here, when denying the validity of a law of the legislature. The answer to this is, that by the

law of this Territory the prosecuting attorney may take exceptions to any opinion or decision of the court during the prosecution of the cause, which he may think to be erroneous, though these words are not in the statute. Then he is to apply for permission to file these exceptions in this court, and if this court is of the opinion, upon the record as presented, that the question shall be decided, they shall allow the case to be docketed, and shall render a decision thereon. Surely no more important questions were ever presented to this appellate court. The questions growing out of the proper penitentiary of this Territory or whether there is one or more than one, is covered and embraced in at least six acts of congress, and as many territorial enactments. The doubts and differences on the subject have led to conflicting rulings and decisions of inferior courts and the judges of this Territory; and it is the duty of this court here and now to settle the questions thus presented as to the penitentiary for the confinement of persons convicted of crime in this territory against its laws, the punishment for which, by these laws, is provided for in the penitentiary. They affirmed this to be their duty when they allowed the bill of exceptions to be filed and the case docketed in this court, which was done after consideration, and they proceed now to discharge that duty by rendering a decision thereon as by law they are required to do. The Territory of Wyoming and all the territories that have been, are now or may be hereafter created by congress, are the creatures of congressional legislation. By it they all "live, move and have their beings," until of proper growth and development, they become states. Then the territorial existence ceases; they become states, and congress has such power of legislation over them and within their territorial limits as is conferred by the constitution over states. During their territorial life they exist and continue usually by organic acts, which it is in the power of congress to alter, modify or change as to it shall seem fit from time to time. Congress, in its dealing with the territory, could of course legis-

late for them directly in all cases if it aw fit so to do, and in some respects, and at some periods, it does this directly, as, notably, in the case of Utah and the District of Columbia. When so legislating, as primarily in organic acts, it provides for them certain officers, defines their duties, in whole or in part, and gives them certain appurtenant machinery of government, and when others are needed, congress provides the several territories with legislatures, and these are clothed with authority to supply all deficient needs; they are authorized to pass laws for the government of the territories, and their only restriction is to be found in section 1850 of the revised statutes, which clothes the several legislatures of the respective territories with power to pass all laws over rightful subjects of legislation, provided they are not inconsistent with the constitution and laws of the United States.

In July, 1868, the Territory of Wyoming was created, and in May, 1869, the territory was formally organized. The first legislature adjourned in December, 1869. Now, in so far as the organic act of the Territory speaks, it is, if consistent with the Constitution of the United States, our supreme law, and, obviously, the territorial legislature can pass no law inconsistent therewith. Is it not in the very line of this thought to hold that whenever congress legislates over any subject touching territorial affairs, the legislation of congress becomes to that extent the only legislation that can be maintained by the courts for the orderly government of its people? If so, and we think so, we have only to apply this principle and we shall find what congress has spoken touching a territorial penitentiary for the Territory of Wyoming.

By an act of congress, approved July 15, 1870, found on page 314 of the Statutes at Large, in the appropriation bill of that year, under the miscellaneous heading, it was enacted as follows: "For the erection of penitentiary buildings in the Territory of Wyoming, forty thousand dollars, or so much thereof as may be necessary," which

Opinion of the Court—Sener, C. J.

sum, or so much thereof as may be necessary, was to be expended under the direction of the secretary of the interior. Under and in virtue of this act, the penitentiary at Laramie was built and set apart for prison purposes.

Then followed the act of congress, approved January 10, 1871, in relation to certain territorial penitentiaries which have been, or may hereafter be erected by the United States in any organized territory, and places them under the care and control of the marshal of the territory or district in which such penitentiaries may be situated. This act, as incorporated in the Revised Statutes, changes *the* to *any* penitentiary, and *any* organized territory to *an* organized territory.

Section two, of the act of January 10, 1871, need not be quoted here; it is the same as section 1894 of the Revised Statutes, and has no bearing on this question just here. Section 1895 of the Revised Statutes has, however, an important bearing on this subject. It is the third section of the act of January 10, 1871, and is here quoted in full. It provides as follows: "Any person convicted by a court of competent jurisdiction in a territory for a violation of the laws thereof, and sentenced to imprisonment, may, at the cost of such territory, on such terms and conditions as may be prescribed by such rules and regulations, be received, subsisted and employed in such penitentiary during the term of his imprisonment, in the same manner as if he had been convicted of an offense against the laws of the United States." For a proper understanding of this matter, and for the reasons that are hereinafter more particularly referred to, we will here cite sections 1892 to 1894 of the Revised Statutes, inclusive, entire, as they appear published in said Revised Statutes, in addition to section 1895, already stated in full:

Section 1892. Any penitentiary which has been, or may hereafter be erected by the United States in an organized territory, shall, when the same is ready for the reception of convicts, be placed under the care and control of the

marshal of the United States for the territory or district in which such penitentiary is situated; except as otherwise provided in the case of the penitentiaries in Montana, Idaho, Wyoming and Colorado.

Section 1893. The attorney-general of the United States shall prescribe all needful rules and regulations for the government of such penitentiary, and the marshal having charge thereof shall cause them to be duly and faithfully executed and obeyed, and the reasonable compensation of the marshal and of his deputies for their service under such regulations shall be fixed by the attorney-general.

Section 1894. The compensation, as well as the expense incident to the subsistence and employment of offenders against the laws of the United States, who have been, or may hereafter be, sentenced to imprisonment in such penitentiary, shall be chargeable on, and payable out of, the fund for defraying the expenses of suits in which the United States are concerned, and of prosecutions for offenses committed against the United States; but nothing herein shall be construed to increase the maximum compensation now allowed by law to these officers.

From what has so far appeared, we find a penitentiary built within the territorial limits of Wyoming by the United States, with United States funds. Now, for what purpose was it erected? For the imprisonment of offenders against Federal laws, who have been convicted?

Section 1892 does not make this distinction, but declares that it shall be placed under the care of the United States marshal, when the same is ready for the reception of *convicts*, not restricting its use or occupancy to this class of convicts. And sections 1894 and 1895 of the Revised Statutes point out how the cost of maintenance shall be borne, and how the penitentiary may be used. The one provides for charging the United States with the cost of maintaining the Federal convicts, or those convicted of offenses against the national authority within the territory; the other points out how the cost of maintaining those **who**

commit offenses against territorial laws shall be paid. That section 1894, which provides for the use of the penitentiary for offenders against the laws of the United States, speaks of those who have been, or *may hereafter* be sentenced to imprisonment in such penitentiary. Now, has it ever been maintained, or can it be, that without a law of congress so directing, the United States, through its attorney-general, could, so long as this penitentiary is kept up, order the imprisonment of offenders (those charged with, or those convicted of United States offenses in this Territory), elsewhere than in this penitentiary?

But it is seriously claimed, notwithstanding this legislation pointing affirmatively to the use of this penitentiary for convicts against territorial laws, (legislation as binding as the organic act, in our opinion), that it is competent in the legislature not only itself to erect or locate another penitentiary, but it is seriously claimed that this can be done for the Territory, not by its legislature but by a third body, erected for that purpose by the legislature, and that in pursuance of such a power and policy it can be erected in Maine, Florida, Alaska or Nebraska, as this commission shall determine. To justify legislation looking to this end, there is running through it all a leaning to economy, which is highly commendable, if from an economic standpoint, so far as the Territory is concerned, the matter was alone to be decided. But if this view were to enter into consideration, with what justice ought the Territory to ask or expect the Federal government to erect buildings for penitentiary purposes in her limits for the punishment of its offenders, and to expect it to provision it and man it, and yet not help to use it? Can any one rationally conclude that the government of the United States, through congress, had any other purpose in building a penitentiary out here in Wyoming, than that it should be used for both United States and territorial convicts? Can it be supposed that in a territory, then numbering less than 10,000 people, the government would have erected a building of sufficient

accommodation for both classes of convicts, (for this was not denied in argument, and all the territorial legislation affirmatively shows it), when its use would be restricted to one class of convicts? Are not sections 1892 to 1895, inclusive, to be read together? Are not the needful rules and regulations which, by section 1893, the attorney-general is required to prescribe, to be held to embrace the rules and regulations that are to contain the terms and conditions on which the territorial convicts are to be received, subsisted and employed? Clearly we think so. The whole question outside of such palpably common sense arguments as these, must depend upon the sense in which the word "may" is used in section (R. S.) 1895. If it is used in a permissive sense, what then? We take it that this will logically and inevitably follow, that if it is to be treated permissively as allowing the Territory to use the penitentiary for territorial prisoners, it was not to be understood as allowing the Territory to use it so long as said Territory should see fit to do so. But if permissive, it was a privilege that once availed of, could not be recalled, save by the permission of congress. If it was permitted to use, surely there is no permission in the statute, or subsequently, to cease the use, or to abandon the use of the penitentiary. That the Territory accepted the penitentiary for its prisoners, is shown by the act of the territorial legislature, approved December 13th, 1873. That act recited the fact that there were several prisoners then at the Laramie penitentiary, and that legislature acknowledged not only its moral and legal obligation to keep them there, but inferentially to send others there *until that penitentiary was closed up or abandoned by the authorities of the United States*. That act, it seems to us, binds the Territory, if the word "may" is to be treated as permissive, beyond recall, save by the consent of congress, to use the penitentiary at Laramie so long as there is prison room there for territorial convicts, and for these reasons:

I. That act speaks of the penitentiary at Laramie as *the*

penitentiary of the Territory, clearly for offenders against territorial laws. The legislature had no authority to declare it a penitentiary for any other purpose.

II. The legislature declared that there were convicts there. If there, they must have been there by enactment of the legislature, or this act must be construed as ratifying their being there, or that no act of the territorial legislature was theretofore deemed necessary on the part of the courts in sending them there, the acts of congress being theretofore doubtless deemed by the courts sufficient authority for that purpose. The word "may," however, has in statutes a separate meaning. Let us see what it is. Bouvier's Law Dictionary, 2d vol., under heading "may," says:

"Whenever the statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as 'shall.' It cites a statute of one of the Henrys, where the sheriff, it is said, 'may' take bail; and again the words 'shall' and 'may' in general acts of the legislature, are to be construed as imperative. The interpretation of the word 'may' in statutes, and the criterion of its meaning, passed under the eye of the supreme court of the United States in *Mann v. Pearson*, 22d Howard. Here the court quotes approvingly, *Rex & Regina v. Barlow*, 2d Sacket's, 609, which says: Where the statute *directs the doing of a thing for the sake of justice or the public good* the word 'may' is the same as the word 'shall.'" The court goes on to cite other cases, and says: "Without going more into details these cases fully sustain the doctrine that what a public corporation or officer is empowered to do for others, and it is beneficial for them to have done, the law holds he ought to do. The law is conferred for their benefit, not his; and the intent of the legislature, which is the text in the case, seems under such circumstances, 'to impose a positive and absolute duty.'"

Tried by these two leading decisions can there be any doubt of the proper meaning of the word "may" in sect. 1895 of the Revised Statutes? Surely the use of the peni-

Opinion of the Court—Sener. C. J.

penitentiary by the Territory for the imprisonment of offenders against its laws was to be for the public good, for the suppression of crime and the correction of the offender. It was for the sake of justice that it was to be so used. If we try it by the principle of the last decision, certainly the territory—the corporation, so to speak, erected by congress—the government of Wyoming was empowered to use this penitentiary for others, *i. e.*, the whole people of the Territory, in the interest of good government, and surely it was beneficial “then” to the people to be allowed its use for the imprisonment of convicts against territorial laws. As we have shown before, the legislature so thought and acted and used this penitentiary because it was beneficial for them to do so.

Suppose, applying another test, the warden of the penitentiary had refused the use of the penitentiary for territorial prisoners: can it be doubted that by proper process under this law the Territory could have exacted the use of the penitentiary for offenders against territorial laws? We think so. If, then, the Territory has a right to its use at any time, and can enforce that right to the extent of its accommodation for its own prisoners, has the United States no right to compel the Territory to use said penitentiary so long as there is room there, unless congress shall otherwise legislate?

It seems hardly necessary to pursue this discussion further, yet we will quote two more decisions of the supreme court of the United States determining the meaning of the word “may.” They are *City of Galena v. Amy*, 5th of Wallace. There the court held an act of the legislature as imperative which said that the city council *may, if it believe the public good and the best interests of the city require it, levy a tax, &c.*

The court cited approvingly the *Supervisors v. United States*, 4th Wallace, 435. There the supervisors were authorized, *if deemed advisable, to levy a tax, &c.*

The court said that permissive language will be regarded

Opinion of the Court—Sener, C. J.

as peremptory where the public interests or individual rights require it. The legislature, in accepting the use of the penitentiary for its convicts, certainly is authority. And can we suppose that they then acted otherwise on the question of the public interests than for the public interests in sanctioning the use of the penitentiary? Again, have citizens who have once committed offense and to be punished therefor, and by the theory of humane laws to be made fit for renewal of their citizenship, no right to consideration as to the place of their incarceration during the penitentiary period? Men and women who commit crime are sent to prisons for fixed terms with the view of making them better, and with the hope that they may again be fit for investiture with citizenship—that they may be again incorporated into the community, not that they may be exiled therefrom and become outcasts. Their *civiliter mortuus* condition is generally only for the period of their punishment. These, it seems to us, are proper views in the light of public interests, leaving out of view the public interests of the overshadowing United States government that built this prison home for us, and have a right to look to the territorial government to assist in its keeping and maintenance, from every consideration of fairness and justice. Their public interests, as well as the other mentioned, are certainly to be consulted and considered in determining the meaning of the word “may” in sec. 1895, of the Revised Statutes. And if so, can we doubt its imperative meaning? Nor do we believe that we do any violence in saying what this law is, or do we believe that congress did wrong in making it. Concede, from an economic standpoint, that it may apparently cost less to keep the prisoners outside the Territory than inside, if such an argument could weigh with us, (which cannot be), is it not of some consideration that in keeping them at home that much money is kept within the Territory, and to that extent helps build it up, and if any part of the Territory be helped, will not in time and in turn the whole be helped?

Opinion of the Court—Sener, C. J.

And so far from imposing a burden or doing an injury to the tax payers of the Territory, is not this mandatory law as to the use of the penitentiary really to their general and public interest? Can this really be doubted when fairly and dispassionately considered? The court further proceeds to say in the last cited case as to the *permissive* word "may" that it shall be treated and read as "shall" when power is placed with a depositary to meet the demands of right and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would be otherwise remediless. The congress, in establishing this penitentiary evidently did so because at that time there was none for the imprisonment of convicts, and they used the word "may," so far as the Territory was concerned, as "shall," because it was then the duty of the Territory to invoke this aid they extended for the confinement of the convicts in a penitentiary, and by the then condition of affairs the Territory would have been remediless so far as having a penitentiary in its own limit went, if it had been shut out from the use of the Laramie penitentiary.

Once accepting its use and using it the Territory exhausted even the permissive force of the word "may," and until congress shall otherwise direct the word "may," must even if originally permissive, which we do not hold, be treated now as imperative and mandatory in this section of the Revised Statutes, to wit: Section 1895.

The tendency of legislatures in making statutes and courts, in construing them to give to the word "may" the force of "shall" or "must," comes to us not only with the sanction of English common law and chancery interpretation, and sustained by the highest tribunal of our own land in the interpretation of Federal and territorial enactments, but the courts of the several states of the Union also have inclined that way most strongly, as will be seen by reference to the cases cited in Abbott's Law Dictionary, under the heading "*May*." There, some thirty decisions from at least twelve states, construe "may" as used *imperatively* and

Opinion of the Court—Sener, C. J.

mandatory, while only some five or six are very obviously treated as permissive. Thus we find ourselves, as we think, sustained by principle, reason and authority in giving to the word "may," in section 1895 of the Revised Statutes, an imperative sense and meaning, and so treating it there for all the purposes of this discussion as having the force of "shall" or "must." It may perhaps be proper to go a step further to answer the point made by counsel in the argument, that the state of Nebraska has authorized the use of the penitentiary at Lincoln, Nebraska, for our territorial convicts. It will be a sufficient answer to this to say that the United States in congress assembled has so far not authorized any such use, which to our minds must be a condition precedent to such use by this Territory of such prison house. To the suggestion contained in the citation of *Kaistendick*, case 3d of Otto, 396, that being a case where the district court in the state of Louisiana sent a prisoner, *Kaistendick*, to the Moundsville penitentiary in West Virginia, selected as such by the attorney-general by virtue of an act of congress,—it will be sufficient to say that the penitentiary was in the jurisdiction of congress, being within the Union. If it be maintained further as it was at bar that the legislation of the territories is the legislation of congress for the territories, we answer yes, such legislation when acting and operating within the limits of the Territory is supreme, when not inconsistent with the laws of Congress or the Constitution of the United States.

We have heretofore maintained that every attempt to erect another penitentiary within this territory so long as the penitentiary at Laramie has sufficient accommodations for the "reception, subsistence and employment of the convicts for offenses against territorial laws," is inconsistent with section 1895 of the revised statutes and so void and of no effect. Hence it follows that each and every act of legislation on the part of the Territory of Wyoming for this purpose, must fail and fall when considered in connection with section 1895 of the Revised Statutes, as interpreted by

this opinion and the decision that will follow in conformity therewith.

Nor can we see any hardship in this matter, as possibly may be felt if the legislation of the recent session of the assembly of this territory is the reflection of the sentiment of its people ; for congress in 1873, by an act to be found in section 1936 of the revised statutes provided that "the care and custody of the penitentiaries in this Territory (among others) and the personal property thereunto belonging, and the use and occupation thereof be transferred to the Territory, until otherwise ordered by the attorney-general, but the legal title to such penitentiary and the property, shall continue to be in the United States, and by section 1937 the congress makes it mandatory to keep all persons convicted in the Territory of violations of the laws of the United States, and sentenced to imprisonment therefor, as well as all persons held to answer for alleged violations of the laws of the United States in such territories, and fixes the rate of keeping at one dollar per day. The act of December 13, 1873, of the legislature of Wyoming, before referred to in this opinion, recited this act and declared that no provision had ever been made by territorial law for assuming such custody and control, and none ever has been passed for assuming it. This act of the territorial legislature expressly conferred authority on a board of penitentiary commissioners to accept and take control of the Laramie penitentiary, *provided* the congress of the United States shall hereafter transfer the same to the Territory of Wyoming.

By transfer, meaning doubtless, if the United States should vest the title of the property in the Territory instead of its custody and control. On the 8th of December, 1869, the territorial penitentiary was, by a law that day approved, located at Laramie, and the rest of that act provided for building and keeping it as such, but that whole act seems constructed upon the idea that the government of the United States would furnish the money and build it and vest the title in the Territory of Wyoming, and the act

Opinion of the Court—Sener, C. J.

of 1877 seems to run in the same direction. That idea and the economy which the legislature seems to have been consulting or attempting to consult, apparently underlie all the controversy as to the penitentiary of the Territory for territorial prisoners. Of course we have nothing to do with the motives of the legislature, but as no motives of this kind, or any other, can cause us to negative and set aside a law of congress in favor of a territorial enactment. If they are reconcilable and consistent we can uphold both. If one be inconsistent with the other, the law of congress must prevail. Our duty is to declare the law. It was the duty of congress primarily (which it has done) to make the law. In making it congress has erected, out of the government funds, in the Territory, one penitentiary, and has said practically: "There is the penitentiary for your Territory! the title is in the United States! You must imprison your territorial felons there! The general government will keep that penitentiary under its control and custody and your convicts will be kept there by our officials at your cost, or you may assume the custody and control of the penitentiary and we will then keep the prisoners convicted of, as well as those charged with offenses against our laws at rates fixed by congress!" The Territory for some years past not in the line of earlier legislation in the other direction, has by its legislation practically said that it will do neither. This court not making but only saying what the law of congress is, declares that as the legislation now stands the Territory of Wyoming must do one or the other, and therefore that it must keep all persons convicted of felonies, made such by territorial laws, in the penitentiary at Laramie city, until congress shall otherwise legislate, and so long as there is prison room there for such convicts. Our conclusion whilst setting aside all the territorial legislation that seeks to create any other prison house as the penitentiary of the Territory save that at Laramie city, yet preserves the distinction between felonies and misdemeanors as defined in the first section of the act approved December 5th, 1873,

Opinion of the Court—Peck, J.

General Laws of Wyoming, 1876, and so essential to the administration of justice.

Any other conclusion would nullify a law of congress, blend penitentiaries and jails in confusion, in direct conflict with the act of December 5th, just referred to, cast upon sheriffs duties never contemplated by fair intendment of proper and consistent territorial laws, make penitentiaries of jails without the consent of the respective counties that built them by taxation and possibly to their detriment in so doing, and enlarge in our opinion without authority of law and without necessity, the scope of territorial legislation so as to give it extra-territorial force. It only remains for the court to render its judgment upon the bill of exceptions presented in this case conformably to sec. 149 of the Laws of Wyoming, p. 158 (hereinbefore cited) of the Compiled Laws of Wyoming, which judgment that statute expressly declares shall not reverse the judgment and sentence in the case of Andrew Nelson, or in any manner affect it, but the judgment now about to be rendered shall be the decision of the supreme court of this Territory which shall govern in any similar case which may be pending at the time this decision is rendered, or which may hereafter arise in the Territory. Wherefore it is considered by the court, and so to be entered of record as our decision, that the penitentiary at or near Laramie city, erected by authority of a law of congress of the United States, is the only penitentiary for the confinement of persons convicted in the several district courts of this Territory for offenses against the laws of the Territory, and punishment for which is, by territorial statute, prescribed to be confinement in the penitentiary unless congress shall otherwise legislate, and so long as there is in such penitentiary prison room for said convicts.

PECK, J., delivered the following concurring opinion.

The prosecuting attorney for Albany county has under sections 146, 147 and 148 of the Criminal Code—Compiled Laws, 157 and 158,—filed here a transcript from the second

Opinion of the Court—Peck, J.

judicial district court for that county in this case, which includes a duly allowed bill of exceptions. Sections 148 and 149 provide that we shall render a decision upon the question so presented; and that our decision shall not affect the judgment that has been rendered below, but shall determine the law for like cases pending at the time of or arising after our decision. Leaving the judgment to stand, we determine principles for future guidance. I speak of a duly allowed bill of exceptions. Coupling sec. 146 with secs. 502 and 303 of the Civil Code, p. 71, I am not clear that the present are not record exceptions under 303; and therefore not appropriate to or presentable by a bill; consequently, that secs. 146, 147 and 148, confer upon us jurisdiction to review them. The subject was not mooted at the bar—should be discussed,—and I concluded for the purposes of this case to treat them as jurisdictionally before us. It would be the duty of this court upon an ordinary appeal to exhaust the exceptions in all the aspects which are requisite to their determination; and *a fortiori* upon an appeal, which is intended to obtain an exposition of all the law that is necessarily involved in the exceptions, our analogies should be exhaustive, except as to subjects which it may be proper to leave for future consideration. At the February term for 1880, the defendant was duly convicted of felony in that court, sitting in that county; the prosecutor moved for sentence to the Federal penitentiary which is located there. The motion was denied, and an exception taken: the court then sentenced Nelson to the Nebraska state penitentiary, which is located at Lincoln, Nebraska, for the term of six months; and to that judgment the prosecutor excepted.

These are the only exceptions that are presented for our consideration. The case has been ably and instructively argued on both sides; and we have endeavored to treat it with the care that is due to its unusual importance.

Nelson objects that the Territory cannot be heard upon the exceptions, because under those sections we can entertain only such exceptions as the prosecuting attorney shall take

during the prosecution of the case, as provided in section 146; and the present exceptions were taken after the prosecution. Whatever can be entertained here upon this proceeding, must be taken under that section. It provides that he may except to any opinion or "decision of the court during the prosecution of the case; the prosecution, so intended, includes every stage of prosecution from the beginning to the end of the case; hence the prosecution of this case includes the present exceptions. Nelson also objects that as he does not, the Territory cannot complain of the sentence. But it does not follow because he was satisfied with it that the Territory must be. The right of the latter to accept is not dependent on his will; he has no voice in the proceeding; as a party his interests are not involved in, nor to be affected by it; hence he does not, and cannot appear here by attorney or counsel or in person; the only one who can appear here against the territory is an attorney appointed under section 147 by the judge who presided at the trial below, and at the expense of the county where the trial was had, and so appointed merely to aid this court in the elucidation of the principles which the exceptions involve.

The second exception. The territorial statute, approved September 15th, 1877, entitled an act providing for the keeping of the territorial prisoners, and other purposes, declares in its section 1 that a given board shall "take charge of, and control all matters pertaining to the care and custody of territorial prisoners"; in its section 2, that the board shall ascertain the relative cost of keeping prisoners and transporting them to the territorial penitentiary located in Albany county; and to other prisons located without the Territory; and may "determine where the territorial prisoners shall be confined; and may make all contracts between the Territory and the authorities of such prisons, either in or out of the Territory; provided that the prisons selected shall be those in which the prisoners can be confined with the least expense to the Territory; that the penitentiaries or prisons so designated and selected

Opinion of the Court—Peck, J.

shall be territorial penitentiaries"; in its section 9, that the board shall notify the judges of the courts of the names and localities of the prisons designated by it as territorial prisons; and that the judges shall thereafter sentence convicts to imprisonment in such designated prisons; and in its section 12, that the board shall report its proceeding to the legislature at the next session. The residue of the act is subsidiary to and dependent upon the parts that I have set forth. Under this statute the board notified the judges of the first and second judicial district courts, that it had contracted with J. H. Stout, the warden and lessee of the Nebraska state penitentiary, which is above mentioned, for the confinement there of the convicts of the Territory, and had accordingly designated and selected that prison as the territorial penitentiary; and thereafter those judges sentenced and sent to that prison the territorial convicts who were subsequently convicted under them. The notice did not state, nor was by the statute required to state, the terms of the contract. The receipt of the notice made it the duty of the court to treat it as founded on a contract conforming to the act.

On the 13th day of December, 1879, an act of the legislature was approved, entitled "an act declaring the state penitentiary of the state of Nebraska a territorial penitentiary of the Territory of Wyoming"; and which declares that the state penitentiary of the state of Nebraska, located at Lincoln, in the state of Nebraska, is hereby declared to be a territorial penitentiary of the Territory of Wyoming, for the confinement of all convicts of said Territory of Wyoming, who have heretofore been sentenced, or may hereafter be sentenced, by any of the courts of said Territory of Wyoming, to imprisonment therein: which act is chapter 80, of the Statutes of 1879.

On the 13th day of December, 1879, there was also approved an act entitled, "an act providing for the keeping of territorial prisoners, and for other purposes connected therewith." The act in its 1st, 2nd, 3rd and 4th sections,

provides for a board of commissioners, to be appointed by the governor and council; invests it with the same powers to determine where the territorial convicts shall be confined; to contract for, select and designate prisons, in or out of the Territory, for their keeping, which are conferred by the act of 1877 upon the board created by that act, and subject only to the same conditions as to economy that was imposed on that board; declares that the prisons, so selected, shall be penitentiaries of this Territory, and requires that the board shall notify the judges of the names and locations of these prisons; and that the judges shall thereafter sentence to the prisons accordingly. Sections 5 to 10, both inclusive, are subsidiary to and dependent upon the prior sections; and the remaining section 11, declares a repeal *in presenti* of all acts and parts of acts which conflict with this act. This is chapter 8, of the Laws of 1879.

The first board notified the legislature at its session of 1879, that it had contracted for, selected and designated the Nebraska prison as a territorial penitentiary; had notified the judges thereof; and that the latter had been sentencing to that prison accordingly: chapter 80 evinces and is based upon knowledge by the legislature of these facts. Chapter 81 repeals the act of 1877; but does not affect the contract which had been made under it. Chapters 80 and 81 being in *pari materia*, and approved together, are to be construed as one statute.

That part of the one statute which consists of chapter 80, confirms that contract; and upon it as a basis, declares that the Nebraska prison shall be a territorial penitentiary for past sentences to it, and until the selection and designation of another under that part which consists of chapter 81, for future sentences. The board contemplated by chapter 81, was filled at the session of 1879, and notified the judges in January following that it had contracted with said Stout, as the lessee and custodian of the Nebraska prison, for the confinement there of territorial convicts; and had accordingly selected and designated it as the ter-

ritorial penitentiary of Wyoming. Having received these notices as district judges, we take cognizance of them as members of this court.

The present sentence must find support, if any, in the contract of the new board, and this leads to an inquiry into the merits of the chapter. Its validity is asserted upon the grounds of the comity of law, the treaty power, constitutional expressions in several of the states of the Union, and a decision of the supreme court of the United States; also Federal provision under the treaty power. The territorial government has the right, and therefore the authority to punish its convicts: the one is the precise complement and measure of the other. The right is restricted and conditioned by the duty of care over the convict; and involves the control and custody of his person. Hence, in the case of a penitentiary offense, the government must transport the convict to prison, in order to secure to itself nothing less, and to the prisoner nothing more and nothing else than the sentence; must have charge of him there, and on the expiration of his sentence, must set him at liberty: to all which a valid sentence and process, continuing and operating in full force down to this point, are indispensable. In exercising its authority over him for punishment, it should have that reasonable regard to his wants which is consistent with the infliction of punishment and incident to humane and wise government; to accomplish it, must attend him throughout by its executive and judicial power. In respect to area, jurisdiction and territorial limits are identical: otherwise, as to area, jurisdiction—if not conferred and lost—would be unlimited, a thing in law impossible and absurd; hence all territorial government stops at the boundary; it has no extra territorial jurisdiction; at that line its coercive and protective power ends. This principle is inherent. In the case of *Albaman v. Booth*, and the *United States v. Booth*, in the 21 How. at p. 506, Taney, C. J., says at page 524: "No judicial process, whatever form it may assume, can have any lawful author-

ity outside of the limits of the jurisdiction of the court or judge, by whom it is issued; and any attempt to enforce it beyond those boundaries is nothing less than lawless violence"; Professor Cooley, in his work on Constitutional Limitations, at page 129, says "the legislative authority of every state must spend itself within the state." I quote these remarks, not because they propound a novel proposition, but because they are clear and forcible statements of a familiar principle; one of them made by an intelligent jurist, the other by a court of supreme authority to this court. In the light of this fundamental, infallible and uniform principle, the statute cannot be upheld.

Nor can it find support upon the idea that the convict has forfeited his rights, and retained no voice as to the place of his punishment. Were that so, he would have no voice as to the mode of his punishment. Neither proposition can be true: his conviction works no forfeiture or suspension of his rights, except so far as forfeiture or suspension is incident to punishment. If punished, the accused has a right to be punished according to law, and that involves, made with the conditions of time and place; he could not be convicted unless he was at the time subject to the territorial government, and it is bound to protect him in all those rights, which a lawful sentence leaves in him; subject to punishment he is entitled to protection; the right of punishment and duty of protection are inseparable, and a statute that ignores the latter, nullifies the former; conviction renders him powerless to protect himself and correspondingly dependent upon the government; it holds him absolutely in its hand, and must entreat him according to that law which is equally binding upon both. There can be no finer spectacle of good government than power so accurately applied to the suppression of crime as to vindicate law without violating right: there can be no more deplorable aspect of perverted authority than to make a victim of the accused in the name of justice.

It was urged that Nebraska does not dissent to the trans-

portation of our convicts over her territory nor to their punishment within her limits, and that her consent was to be presumed and *ex parte* Karstendick, 3 Otto, 396, was cited in support of the proposition. Though this case fails of showing assent, and there is no room for the presumption, and that citation does not support it, let the presumption be conceded the better to test the effect of such assent upon the statute which is under inquiry. The proposition proceeds upon the idea that the state has the power of assent. The principle is clear, that one state cannot convict and punish for crimes committed in another: on this ground one state cannot punish for convictions had in another. Park, C. C., 592; *The People v. Merrill*, 1 N. Y., 172; *Adams v. The People*, 2 Mich., 320; *Taylor v. The People*, 2 Mich., 472; *Bradley v. The People*, 11 Mich., 327; *Morrissey v. The People*, 16 Wis., 398; *State v. Mann*—Professor Cooley adds at the page last referred to in his work, "A state cannot provide for the punishment of acts committed beyond the state boundary as crimes, because acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done." This principle can be displaced, if at all, only by constitutional or statutory law, and there is no evidence of the existence of such law. Assume, however, that Nebraska has the power to assent. How does the power and its exercise aid the Wyoming act? The power and right of the Territory over its convicts is confined by the organic act to the territorial limits by the very prescription of the limits. The Federal government has not consented to the transportation of the convicts beyond those limits, but by prescribing the limits has required the convicts to be punished within them. Hence the consent of Nebraska is ineffective.

It is urged that, if a foreign prison cannot, the penitentiary in Albany county cannot be used by the Territory, because, owned and controlled by the Federal government, it, as much as the former, is beyond territorial jurisdiction. The cases are entirely dissimilar.

Under art. 4, sec. 3, subdv. 2, of the Constitution, empowering congress "to make needful rules and regulations respecting the territory of the United States," that government has placed the penitentiary at the use of the Territory, and in so doing, has exercised a supreme discretion: in that discretion it has provided the courts, in which felonies committed against the Territory, shall be prosecuted: in the same discretion has furnished facilities for punishing the convicts; and in punishing them has made it jurisdictional for the Territory to use them.

The organic act clothes the governor with unrestricted pardoning power as to territorial convicts; and neither can the legislature interfere with, nor can he divest himself of the prerogative, because it imposes a trust. The grant of a pardon is an executive order for the discharge of the convict; overrides all other power within the executive jurisdiction and may call upon that other power for support and enforcement; but it can be adequately enforced only within the Territory. Doubtless a pardon would be in a foreign jurisdiction the basis of ultimate relief; but it is inconsistent with the purpose and dignity of the prerogative, that its efficiency should depend upon the employment of foreign law. This statute assumes to nullify the prerogative. Cooley on Const. Lim. 116. Sustain the statute and the power is extinguished: sustain the power and the statute is void.

As then the comity of law is wholly unsuited to the relations of right and duty which the Territory occupies towards its convicts, it does not aid the statute.

Nor can support be found for it in the treaty power. If that exists as a state, it so exists because it is incident to state sovereignty, which is full, less what the state has relinquished to the Union. The state preceded the Union. The territorial status is created and measured by, and dependent on the will of the Union: if the power can be attached to a territory, it can be done only under the constitutional provision above referred to. It has not been

Opinion of the Court—Peck, J.

done. The Karstendick case,—Section 5539 of the U. S. Rev. Stat., first edition, provides that when an United States convict is imprisoned in a state penitentiary, “the criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state in which such penitentiary is situated; and, while confined therein, shall be exclusively under the custody of the officers having charge of the same under the laws of such state:” and sections 5541, 5542 and 5546 that convicts of the United States, whose punishment is imprisonment in a district where at the time of conviction there is no penitentiary, suitable or available for the confinement of convicts, shall be confined during the term of sentence in a suitable penitentiary in a convenient state, to be designated by the attorney-general, the use of which penitentiary is allowed by the legislature of that state for the purpose; and shall be transported or delivered to the warden or keeper of the penitentiary by the marshal of the district where the conviction is had: and section 5547, that “the attorney general shall contract with the managers or proper authorities * * * * * having control of such prisoners, (United States convicts), for the imprisonment, subsistence and proper employment of them, and shall give the courts, having jurisdiction of such offenses, (the offenses for which such convictions have been had) notice of the penitentiary where such prisoners shall be confined.” Karstendick was convicted in the United States court in Louisiana, and sentenced for confinement for sixteen months in the penitentiary of West Virginia located at Moundsville in that state, under a notice from the attorney-general to the court, designating that prison as a penitentiary where such convicts should be confined; and was accordingly committed to the prison by the marshal of the district where the conviction was had: and then moved before the supreme court of the United States for a writ of *habeas corpus* with *certiorari*, upon grounds each of which was to the point that it did not appear by the record of his conviction that the steps had

Opinion of the Court—Peck, J.

been taken proper to authorize the sentencing court to sentence him to a penitentiary beyond the district of his conviction. The court overruled the objections, prefacing that part of its decision with the remark, that "It is conceded that congress has the power to provide that persons convicted of crimes against the United States in one state, may be imprisoned in another. Congress can cause a prison to be erected in any place *within the jurisdiction of the United States* and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there; or it may arrange with a single state for the use of its prison, and require the courts of the United States to execute their sentences of imprisonment within them."

The disjunctive "or," in this remark introduces an alternative, not to the idea of confinement within Federal jurisdiction, but to that of direction in one case as distinguished from arrangement in another, the alternatives being subject to the principle of that jurisdiction. Thus the court held the Federal statute to be valid, because it authorized the Federal courts to sentence for punishment in a state prison, located within the Federal jurisdiction. There can be no intelligent doubt of the correctness of the conclusion; for the jurisdiction embraces the Union area, and under those sections, Federal authority transports Federal convicts; can protect them from abuse there and secure to them due release on the expiration of their sentences, accompanies and surrounds them by its executive and judicial protection, and completely retains them within the reach of executive clemency. It does not or need not follow, it is true, from what I have quoted of the decision, that under those sections the Federal government could execute its sentences upon the convicts, so confined in state penitentiaries, and this for want of control over its convicts, while within them, and the sentences might fail of execution for want of rigid enforcement; but this would involve no invasion of the rights of the convicts, only a sort of relaxation or abatement of the prescribed punishment; the convict would be

Opinion of the Court—Peck, J.

protected by his, the government might suffer in its right. Thus the Federal statute was sustained on the principle that it provided for punishment within, and we are asked to sustain the territorial statute on the principle, that it provides for punishment without the jurisdiction; the case of Karstendick and the present case are antipodal, not parallel.

But as to the effect of the Federal statute, the court went farther in that case, and said: "It is farther insisted on behalf of the petitioner that the state of West Virginia has not given its consent to the use of the penitentiary of the state of West Virginia by the United States for the punishment of their criminals, and that for this reason the order for his confinement there is void. The petitioner is actually confined in the penitentiary and neither the state nor its officers object. Congress has authorized imprisonment as a punishment for crimes against the United States in the state prisons. So far as the United States can do so, they have made the penitentiary at Moundsville a penitentiary of the United States, and the state officers, having charge of it, their agents to enforce the sentences of imprisonment passed in their courts. The question is not now whether the state shall submit to the use of its property by the United States, nor whether those state officers shall be compelled to act as custodians of those confined there under the authority of the United States, but whether the petitioner can object, if they do not. We think he cannot, as the state permits him to remain in the prison as the prisoner of the United States, and does not object to his detention by its officers; he is rightfully detained in custody under sentence lawfully passed." Thus Karstendick did not question the right of the general government to contract with a state for the use of its prison and its prison officers, nor its power over the prison and its officers if a contract had been made; only that in his case a contract had not been made; and the court replied that West Virginia was permitting such use in his case, and its prison officers were acting accordingly,

and that was evidence that such contract had been made; and it seems to me that the court might have added, that back of that evidence was other, and of itself controlling evidence to the same effect, namely, that the attorney-general's designation to the sentencing court of the Moundsville prison was presumptive that he had made the requisite contract with that state. And in this particular that case essentially differs from the present one: in making the designation the attorney-general was acting but officially, not under personal interest, and did not occupy an attitude adverse to the presumption; in making the contract with the board, Stout acted as lessee, as well as custodian of the prison—under personal interest—and did occupy an attitude adverse to the presumption that Nebraska had authorized the contract.

The respect due from me to the United States supreme court permits the suggestion, that, as an open inquiry there is room for doubt, whether the use of a state prison, contemplated by this Federal statute, means a control by the Federal government of the interior of the prison for the enforcement of its sentences; and that to the extent of such control, the prison and the officers who are attached to it by the state, become respectively the prison and the agents of that government; for, to be such, they must be under its supervision and direction; whether by the provisions that Federal convicts while confined there, shall be in all respects subject to the same discipline and treatment which are applied to the state convicts who are confined there, and exclusively under the custody of the officers who have charge of the prison "under" which signifies, by and according to the laws of the state, the contract of the attorney-general—which must keep within the provisions—can do more than to put upon the given state the enforcement of the sentence through its prison and prison officers, over both retaining control, as to both being responsible to that government and standing between it and them accordingly. The inquiry, however, has ceased to be abstract, if

Opinion of the Court—Peck, J.

that court means what it says, its statement that the effect of the statute, through the contract, is to convert the state penitentiary into a Federal penitentiary and the state officers into Federal officers for the enforcement of Federal sentences, is a construction that transfers to that government that control for that purpose; so that it, not the state, in person punishes its convicts in the prison of the latter. Notwithstanding the explicitness of its expressions, I hesitate at the idea that the court intended to go so far. If, however, it did, under the statute that government retains its full coercive power over its convicts, strictly observing the jurisdictional condition. In this view the Karstendick case becomes a complete authority against ch. 81.

In support of the judgment we are reminded that the United States has acquired within the limits of several foreign governments, territorial areas for the purpose of its diplomatic service with those governments; which areas are appropriated to the use of its legations, located at those governments; and over which areas it exercises criminal jurisdiction to convict and punish within them. This is an additional illustration that the general government confines the exercise of its primitive power to its limits, whether at home or abroad; and that its practice lucidly and forcibly condemns the departure which this territorial legislature attempts to inaugurate.

In this connection the English and French practice as closely conformable to the jurisdictional principle, is instructive. Foreign transportation, as a method of punishment, is unknown to the British courts: in them a convict transportation "beyond the seas," has never meant more than transportation in British bottoms—which are British territory—from one part to the other of the British realm. Convict transportation in the French court has never meant more than the transportation in French ships—which are French soil—from one to another part of the French dominion.

The history of civilized governments presents no instance

Opinion of the Court—Peck, J.

to the contrary, except in the case of several of the American territories. The principle belongs to the common law, but also to general civilization. In support of the judgment provisions have been produced from the constitutions of several of the states of the Union against foreign convict transportation, upon the proposition that a preventive clause in a constitution recognizes, as inherent in the government or sovereignty, the thing prevented; in the absence of prevention: but I do not accept that proposition as a correct rule of constitutional interpretation; the true, broader and more useful one is, that the office of a constitution is to define and formulate a government and its powers; and hence constitutional provisions create, inhibit, enlarge, restrict, declare according to the aim which is to be accomplished; so that in the abstract, the provision relied upon can be quoted no more as restrictive than as declaratory; but in fact preceded by a principle of the common law, which is to the same effect, they are declaratory.

In support of the judgment, provisions from the constitutions of several other of the states of the Union, recognizing exile as a form of punishment, have been produced. But chapter 81 does not contemplate expatriation; nor does the judgment attempt to inflict it. Consider, however, that method as analagous to transportation. The learned counsel has failed to suggest an instance in our judicial history, in which punitive expatriation has been imposed in this country; and I feel safe in asserting that none exists. Those provisions are probably mere relics repeated from colonial charters and statutes; are unaccompanied by judicial sanction, and stand in the constitutions that contain them, as political abstractions, or effete ideas. I am not prepared to admit that punitive expatriation is an incident of state sovereignty in the Union; it is not recognized in the Federal practice, and cannot be regarded as an incident to the territorial status, for it is an incident in the latter, if it is there.

Chapter 81 forcibly illustrates the error of its principle,

Opinion of the Court—Peck, J.,

which it aggravates to the extreme. It authorizes the board to contract in its absolute discretion for a home or a foreign prison, provided the selection subjects the Territory to the least expense in the punishment of its penitentiary convicts. The rule of economy is the only limitation upon the power of the board to select, and is as much a condition of duty as a restriction upon authority. It may as validly contract with the most remote state in the Union, as with Nebraska; with the most remote government without, as with a state within the Union; with a barbarous as with a civilized power. The amplitude of the power, and the complications of its exercise expose the trust to easy and elusive abuse, and the statute has provided no method for ascertaining or preventing abuse,—actually renders the action of the board impossible. Upon the same principle the territorial government might arrange for the execution of its capital convicts without its limits. It would be a singular but a consistent stretch of legislation.

The second exception presents several constitutional questions which I have passed over, deeming them too grave to be disposed of without further argument.

The first exception. Chapter 81 closely conflicts with the Federal legislation respecting the penitentiary which is located within the Territory. The United States Revised Statutes, title twenty-third, "the territories," provide in section 1892 that every penitentiary in an organized territory shall be under the care and control of the marshal of the territory; in section 1893, that "the attorney-general of the United States *shall* prescribe all needful rules and regulations for the government of" the penitentiary; and the marshal shall cause them to be observed; and in section 1895, that "any person convicted by a court of competent jurisdiction in a territory, for a violation of" its laws, "and sentenced to imprisonment, *may*, at the cost of such territory, on such terms and conditions as *may* be prescribed by such rules and regulations, be received, subsisted and employed in such penitentiary during the term of their

confinement, in the same manner as if he had been convicted for an offense against the laws of the United States." By statute, full, explicit and in force on the 15th day of December, 1879, this Territory had accepted that use of the Federal penitentiary, located within it, and provided for the consequent expense; the district courts of the Territory sentenced, and committed to that prison accordingly; and it was at that date the lawful penitentiary of the Territory for territorial cases. That the Federal law was, and is permissive to this extent, is indubitable, but it was and is also imperative. What is the meaning of "may," where it first occurs in the quotation from section 1895? In statutory construction the term is to be read as permitting or directing according to context and purpose: and hence in the quotation as "shall." Section 1893, in requiring the attorney-general to prescribe rules and regulations, says that he "shall" prescribe them; section 1895, in providing for the use of the penitentiary for territorial convicts, and at the cost of the Territory, requires it to be on the terms and conditions which "may" be prescribed, etc. "May" necessarily meaning "shall," that the section may be consistent—otherwise what 1893 commands him to do, he may under 1895 elect to do: the word "may" is repeated in the same sentence in the quotation from section 1895; and as the context employs it imperatively where it secondly occurs, it is open to the presumption that it so uses it where it first occurs. The purpose of the Federal act requires that it shall be so read. The Constitution puts upon the general government the care of the territories, creates between them the relation of guardian and ward; section 1895 is a declaration by that government that it was needful to the Territory—that a penitentiary within it was needful to it—a need of which that government was the supreme judge: a Federal statute, relating to a territory, because passed in the execution of that trust, because it can be passed only under this constitutional requirement, and because it is an expression by the controlling will that

Opinion of the Court—Peck, J.

it is necessary to the proper care of the Territory, is presumptively imperative; and must so operate, unless the text and the purpose call for a permissive construction. The court might, therefore, stop here, and declare the section to be imperative, because there is nothing in the text or purpose to indicate that it is permissive. But further consideration confirms this view. A penitentiary was indispensable to the machinery of the territorial government; when the present one was built, the Territory was in its infancy; its population numbered but about nine thousand, and was sparse and shifting; its taxable property was small in amount; it was large in area, rich in resources, located upon the route of trans-continental and inter-oceanic traffic, and capable of and promising a large and prosperous expansion; a suitable penitentiary would be one built not merely for present, but also for future wants; and built upon the idea of permanency: economy forbade the erection of several; required the erection of one—and that one for the joint use of the two governments: the Territory was unequal to the erection of one suitable for its own wants; its necessities and its inability were known to the general government, and constituted an especial appeal to its case; that government must supply the want, or the Territory be left unprovided for; that government built the present penitentiary far in excess of its own present, or, so far as they could reasonably anticipate, its own future wants, but fully adapted to the permanent use of both governments; and forthwith devoted it, and has ever since kept it open to the use of the Territory; and upon the simple and just condition that the latter should, for that use, contribute to its support. It would be insensible to conclude that the general government, having incurred the expense of the erection principally for the benefit of the Territory, intended to leave it to the latter to use the institution or not, to share in its maintenance or not, at will. I am forced to conclude that the former, having the power to protect itself against an abuse of its case, and to do this without injustice, in-

tended to exercise the power by devoting the use of the prison to the Territory; and did exercise it through section 1895 as a requirement that it should use the prison, and should pay such price for the use as that government, in the exercise of its supreme discretion, might deem proper. I therefore hold that this section makes the Federal penitentiary, now located in Albany county, the territorial penitentiary, to which alone territorial convicts, in cases of felony, should be sent, and to which, therefore, Nelson should have been sentenced. This limitation to cases of felony arises from the fact that the common law, in punishing misdemeanor by confinement, imprisons in the county jail; and the Federal act indicates no intention to affect the common law in this particular.

With the exception of its repealing effect chapter 8 is invalid: the judgment of the district court conflicts with Article V, of the constitutional amendments, which forbids that any person shall be deprived of his liberty without due process of law; and each of the exceptions was well taken.

Judgment accordingly.

CASES
ARGUED AND DETERMINED
IN THE SUPREME COURT
OF THE
TERRITORY OF WYOMING.

MARCH TERM, 1881.

HECHT *v.* BOUGHTON.

EJECTMENT.—In ejectment, it is a uniform principle that if both parties claim title from the same source, it is treated, for all the purposes of the case, as if the title resided in that source, each party is estopped from denying it, and so far as respects that source the controversy is reduced to the inquiry: which party, plaintiff or defendant, if either, has title from that source.

TAX PROCEEDINGS.—Tax proceedings being *in invitum*, are to be strictly construed, and whatever is essential to their validity must be affirmatively shown by the party who claims under them.

IDEM.—Constitutional law forbids the levying of a tax before the owner of property has had an opportunity to object to the assessment.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion delivered in the district court, by Peck, J.

C. N. Potter *E. W. Mann* and *W. W. Corlett*, for plaintiff
in error.

After the plaintiff's counsel had announced their case as closed, the court suggested an absence of certain proof, and allowed them to proceed with further testimony in their opening, under the objection of defendant. This may be a right within the discretion of the court, and it may be argued that no matter within the discretion of the court

Argument for Plaintiff in Error.

will be reviewed by an appellate court. While such was probably the old doctrine, it is surely exploded now, and appellate courts are continually giving their attention to such matters. Powell on Appellate Proceedings, pages 195-199.

The petition alleges ownership in fee, and for that reason a right to possession. It is true that in ejectment a plaintiff may recover by showing a conveyance from one having had prior adverse possession, with no abandonment thereof, by grantor or grantee, but why? because from that fact the courts will *presume title*, and hold that such evidence establishes a *prima facie* case, on account of that presumption—but the possession to warrant a presumption of title must be an *adverse* possession. Hilliard on Rem. for Torts., sec. 56, p. 171; Hilliard on Rem. for Torts., sec. 65, p. 175; *Murphy v. Wallingford*, 6 Cal., 648.

The law presumes, till the contrary be shown, that a man in possession without title intends to hold for the true owner. Tyler on Ej., 859; *Harvey v. Tyler*, 2 Wall., 328; *Morrison v. Hays*, 19 Ga., 294.

A person in the full possession of all his faculties, and able to read, is *bound* to know and understand the contents of an instrument executed by him or in his possession as a party to it. Such a person cannot say that he did not read the instrument. Bigelow on Fraud, 73 to 82; *Bacon v. Markley*, 46 Ind., 116; *Hawkins v. Hawkins*, 50 Cal., 558.

J. W. Fisher and *T. D. W. Yonley*, for defendant in error.

It rests in the discretion of the court to allow evidence to be introduced after the testimony has been closed. *Moon v. Starbuck*, 4 Cal., 274; *Russell v. Kerney*, 27 Geo., 96; *Wills v. Walker*, 29 Geo., 450; *Fall v. Cathcart*, 8 Ala., 725; *Priest v. Union Canal Co.*, 4 Cal., 170.

The delivery of the deed to Mrs. Boughton is not only established by her oath, but is presumptively shown by the fact that the deed is of record. *Kille v. Ege*, 79 Pa. St., 15,

Argument for Defendant in Error.

Cecil v. Beaver, 28 Iowa, 241; *Kerr v. Bernie*, 25 Ark., 225; *Jackson v. Cleavland*, 15 Mich., 94; *Bulitt v. Taylor*, 34 Miss., 708; *Billings v. Stark*, 15 Fla., 279; *Reed v. Douthet*, 62 Ills., 348; *Tuttle v. Turner*, 28 Tex., 759; *Benson v. Wood-verton*, 2 McCarter, N. J., 158.

The true consideration of a deed may be shown in certain cases, even against the recitals of the deed, but it can never be shown that there was no consideration for the deed for the purpose of defeating the deed entirely. *Wilt v. Franklin*, 1 Bin. (Pa.) 502; *Farrington v. Barr*, 36 N. H., 89; *Hurn v. Soper*, 6 Harr. & Johns, (Md.) 276; *Betts v. Union Bank*, 1 Harr. & Gill., 175; *Clagett v. Hall*, 9 Gill. & Johns. (Md.) 91; *Cole v. Alders*, 1 Gil. (Md.) 423; *Elysville Man. Co. v. Okisko Co.*, 1 Maryland Ch. Decis., 392; *Henderson v. Henderson*, 13 Mo., 152; *Fellows v. Wise*, 49 Mo., 350; and see to the same effect, *Spec v. Gregg*; *Myrie v. Wells*, 52 Miss., 149.

Mere difference of opinion between the courts ought not, for obvious reasons, to be deemed sufficient to reverse a judgment. *Ide v. Churchill*, 14 Ohio St., 377; *Eastman v. Wright*, 4 Ohio St., 156; Powell on Appellate Jurisdiction, p. 229.

And the rule is the same when the facts are found by the court sitting as a jury. *Moss v. Atkinson*, 44 Cal., 16; *Gale v. Water Company*, 44 Cal., 46; *Smith v. Athern*, 34 Cal., 509.

But the defendant relied upon a title acquired by him through a purchase at tax sale, and the burden was upon him to show a compliance at every step with the requirements of the statutes. There is nothing in the statutes of Wyoming making the tax deed for any purpose evidence of the facts therein recited; and without a statute for that purpose, the recitals could not have that effect. Burroughs on Taxation, p. 333.

The plaintiff not only failed to show a technical compliance with the statute in the tax proceedings under which he claims title, but, on the contrary, it appears affirmatively

Opinion of the Court—Peck, J.

that the law was not complied with. *Corporation of Washington v. Pratt*, 8 Wheat., 687; *French v. Edwards*, 13 Wall., 506; *Ainsworth v. Dean*, 1 Foster (N. H.), 400; *Llead's Executors v. Course*, 4 Cranch., 403; *Dyer v. Boswell*, 39 Md., 465.

PECK, J. This is an action of ejectment for lots one (1) and two (2) in block three hundred and fifty-three (353), located in the city of Cheyenne, and mesne profits, brought in the first district court by Mary E. Boughton, the plaintiff below, against Charles Hecht, the defendant below. The defense was made by the plea of the general issue; the case was tried by the court without a jury, and judgment rendered for the plaintiff below for the possession and for mesne profits. After argument and careful consideration, we concur in the rulings below upon the admission and exclusion of testimony; and for the reasons stated in the opinion of that court which is embraced in our record, and is adopted as our opinion; we concur in its ruling on the motion for a non-suit, and in its conclusions of fact and law, and in its judgment rendered thereon. As no error has been well assigned, that judgment must be affirmed, and with costs.

Opinion delivered in the District Court by PECK, J.

I was entirely satisfied, on the conclusion of the evidence, as to the judgment that should be rendered. The case was well argued; but the argument did not change my mind. In view however, of the voluminousness of the testimony, I deemed it prudent to wait and examine the stenographer's transcript; it has since been made. I have examined it, and have found no reason for altering my view; I therefore proceed to deliver an opinion in accordance with my original conviction.

This is an action of ejectment for lots one and two in block three hundred and fifty-three in the city of Cheyenne, and for mesne profits. The plea is the general issue.

Opinion of the Court—Peck, J.

The plaintiff's evidence tends to show, and, unimpeached, does show, that Martin V. Boughton occupied the premises in question continuously in his own right for several years prior and down to the execution by him to her of a deed in fee of the premises, dated February 16, 1871; that she then took, and continued in possession under the deed and in her own right, first through her grantor, and next through one Smith, until she was ousted by the defendant in April, 1877; and that the United States by a patent dated April 17th, and recorded in the county clerk's office of the county of Laramie, on the 19th of May, 1874, conveyed the same premises at the date of the deed to the Union Pacific Railroad Company. Upon this state of the evidence the defendant claims that the plaintiff has shown title out of her grantor, and out of herself, as his successor in interest, and therefore that she has nothing to recover upon. Now, allowing that the proof of the patent does show title out of her grantor, and so far as she relies upon his title, out of herself, the proof of the patent only cuts down her title to the date of the patent, leaving her to stand upon an adverse title in herself by possession, which has been continuous from that date to the ouster. This gives to her title enough to recover upon, unless the defendant has shown a better; it cuts off his claim of superior title under the sheriff's deed to him of April 21, 1877, on a sale under an execution against Martin V. Boughton, which sale was made of the premises as belonging to the latter; and it cuts off the defendant's claim of superior title under the tax-deed from the county treasurer, executed to him on the 30th day of December 1878, upon a sale of the premises upon a delinquent tax assessed and levied against M. V. Boughton, as the owner of the premises,—it cuts off the tax title, provided that the tax can bind the premises only as belonging to M. V. Boughton when they were assessed and the tax laid upon them, or during the conduct of the tax proceeding, and as otherwise duly laid and enforced: for these two alleged titles, the one by execution, the other by tax, are the defendant's entire

grounds of claim; and unless the tax title can hold, as binding the land, though not belonging to M. V. Boughton during the tax proceedings, and as otherwise duly laid and enforced upon it, insomuch as he is the defendant's only source of title, the effect of the patent in cutting off the Martin V. Boughton title, and with it the defendant's lease, as the controlling title, that which the plaintiff acquired by an adverse possession subsequent to the patent.

It does not, however, follow that the effect of proving the patent is to cut the Boughton title off, down to the date of the patent. Under section 485 of the Union Pacific land grant the United States conveyed to the company the equitable title to the lands, specified in those sections, to be confirmed upon the accomplishment of given conditions, which are also therein specified by a patent from the United States conveying the legal estate in fee. The execution of the patent is conclusive that the conditions were satisfied, and that at its execution the company had acquired as against the government, a full equitable title. The Boughton title was founded on an adversory possession, which if uninterrupted, would have ultimately overcome and extinguished the title of the company.

But it is an uniform principle of ejectment that if both parties claim title from the same source, it is treated for all the purposes of the case that title resided in that source; each party is estopped from denying it; and so far as respects that source, the controversy is reduced to the inquiry, which party, plaintiff or defendant, if either, has got title from that source. That is the next question in this case.

Before passing to that question, it is proper to notice another position of the defense,—namely,—that the plaintiff could not declare upon a seisin-in-fee, as she has done, and seek to recover upon an incomplete possessory title, as she does seek to recover. But such a seisin is founded equally upon possession as upon grant, and is proved as well by the former as by the latter: though inchoate, because the possession has not reached the full period, it is still a seisin

Opinion of the Court—Peck, J.

and is as effectual against a stranger, as if matured by possession. The petition alleges in terms a seisin-in-fee in the plaintiff and a corresponding right of possession, without alleging how the seisin arose; she was therefore at liberty to prove it by whatever sufficed for the purpose; and under the issue the defendant cannot have been surprised by the proof that she introduced. The petition is more precise and technical, as a petition suitable to setting forth her title, than section 557 of the Civil Code requires.

The defense claims that the Martin V. Boughton deed was executed to his wife, whose name is Mary Boughton, for a valuable consideration paid to him by her; that she was intended by the name, "Mary E. Boughton," contained in the deed as the name of the grantee, the initial "E." having been inserted by mistake, and that the Martin V. Boughton interest was not conveyed to the plaintiff, because she is a stranger to the deed; nor to Mary Boughton, because she was the grantor's wife, and the execution of the deed was thus inoperative, leaving the interest in him. If the real grantee in this deed was the wife, the plaintiff's title is junior and inferior to that of Martin V. Boughton; the execution sale, if valid as against the latter, transferred his title to the defendant; the latter's entry in April 1877 was under superior title; and his ouster lawful. Thus the execution deed is let into operation. But, if the real grantee in the Boughton deed is the plaintiff, Martin V. Boughton's title vested in her, the execution deed could have passed nothing to the defendant; and so far as respects it his entry was without title and his ouster illegal. Who then is the grantee in the Boughton deed? The defense also claims that, if the plaintiff is the grantee, the deed was not delivered until after the execution deed had been delivered; and if this position is correct, his deed is superior to hers. When therefore was her deed delivered? The virtue of the execution deed hinges on these inquiries. The inquiries involve a consideration of the plaintiff's evidence. She has been repeatedly upon the stand, and under much cross-

Opinion of the Court—Peck, J.

examination. She has throughout impressed me as an honest witness. It remains to be determined whether she has also been an accurate one. In weighing her evidence, also in estimating her conduct as a claimant to the title, I must consider that she is a woman unskilled in business; confiding; had an unreliable husband; and naturally and habitually came to lean upon his brother, Martin V. Boughton, as her protector and adviser. Late in 1870 or early in 1871 she was at Bryon with her husband; Martin V. came there and borrowed from him \$2,000; she became anxious on account of the loan, and remonstrated against it, and the result was an agreement between the three that Martin V. should deed to her in fee for the \$2,000, the lots in controversy; he soon returned to Cheyenne, where he then resided, and employed Thomas J. Street to draft the deed, and see to its execution; Street was a practicing lawyer at Cheyenne, and the evidence of professional experts show that, when sober, he was a careful and precise draftsman of law-papers; the structure of the deed is conclusive that he was sober when he prepared it, and saw to its execution; he must have derived from Martin V. Boughton his knowledge of what the deed was to contain, the name of the grantee included; in asking for the information, his habit of care and precision would govern him.

Martin V. Boughton then furnished to him the name of the grantee, and therefore, as such, the name "Mary E. Boughton," being at the time as familiar with the name of the plaintiff as he was with that of his wife, and knowing that the only distinction between their names was by the plaintiff's middle initial "E.;" the deed having been prepared, he signed and acknowledged it; the deed has been put in evidence, speaks for itself, and is proved to be in Street's hand; the instrument does not mention the name, "Mary Boughton," it does contain the name, "Mary E. Boughton," and three times, and just where it should contain the grantee's name—once in the granting part, next in the habendum, and finally in the covenant; the deed was duly

Opinion of the Court—Peck, J.

filed for record on the 18th day of February, 1871, two days after its date and acknowledgment; was not so filed by the plaintiff, and must have been filed by Martin V. Boughton or his conveyancer; it has an endorsed title in these words, and in the following order:

DEED.

MARTIN V. BOUGHTON

to

MARY E. BOUGHTON.

—and the endorsement is in a large, bold, clear hand, such that it would be impossible for any one, handling the document, to fail seeing at a glance the entire title: the plaintiff visited Cheyenne in June, 1871, immediately called upon Martin V. Boughton, at his office, asked for the deed, which he had so agreed to execute to her, and he then produced, and handed, and thus delivered to her the deed, which he had so prepared for delivery to her, and had acknowledged, accompanying the delivery with the remark that he deeded the property to her, as he had previously agreed at Bryon to do: having so delivered the deed, and on the same occasion, he suggested to her that she had better, for greater safety, leave it with him to keep for her; yielding to the force of an habitual confidence, she then handed it back, he receiving it as her custodian, and subject to her call; it was precisely such a deed as he was bound to execute to her; he must have known that it ran to her, and not to his wife as grantee: under that obligation and with that knowledge he delivered it to the plaintiff as her grantor, and received it back as her agent, and in the last mentioned capacity retained it until the latter part of 1877. At Bryon the plaintiff's confidence in Martin V. Boughton was shaken by his obtaining the \$2,000: it was restored by his agreeing to deed, and soon after, and promptly upon her arrival at Cheyenne performing the agreement. He coupled with the delivery of the deed a

Opinion of the Court—Peck, J.

delivery of possession, and she received and held possession under the deed until the ouster: and according to his own testimony he did not intimate to her that she was not, and that his wife was the grantee, until on or immediately before December 10, 1875, nearly five years after the preparation, and four and a half after the delivery of the deed. Upon her cross-examination the plaintiff said that she was at Deadwood in the latter part of 1877, and Martin V. Boughton sent it to her: she was then asked how she knew that he sent it back, and answered that she knew it by knowing that she sent to him for it, and it came: she was next and on cross-examination asked, if she did not know that Mrs. M. V. Boughton gave her, the plaintiff's messenger, the deed, and answered, "No! I do not think she did;" later in her evidence the plaintiff stated that, when she got the deed back at Deadwood, Martin V. Boughton and his wife were keeping house together there. To meet this evidence as to the return of the deed, the defense introduced William W. Corlett as a witness, who testified that the plaintiff told him that at Deadwood she sent a party to Martin V. Boughton for the deed, and the messenger brought it back to her representing that Mrs. Boughton gave it to him, the messenger. I accept this testimony of the witness Corlett, as true, and believe that the plaintiff explained to him the return of the deed to her at Deadwood, just as he states that she did. If this evidence of the last mentioned witness was introduced to impeach the plaintiff it fails of that effect: she does not deny either directly or impliedly that the deed was sent back to her by Mrs. Martin V. Boughton; the question whether she did not know that Martin V. Boughton's wife gave the deed to her messenger, was evidently put on the assumption by the interrogator that the messenger did represent to the plaintiff that Mrs. Martin V. Boughton gave it to him to take to her, and in the belief by the interrogator that Mrs. Martin V. Boughton did hand the deed to him, but the answer does not deny that the messenger made the representation, only

expresses the plaintiff's belief that Mrs. Martin V. Boughton did not hand the deed to him; moreover, while it does not follow, as a matter of course, that Martin V. Boughton participated in the return of the deed, his wife's sending it is consistent with the idea that she did it at his request: but (farther) whoever sent it, the deed came back to its owner, who had a right to its possession on call, and to take it whenever and wherever she could find it. But this testimony of the witness, Corlett, more than fails to impeach, it confirms and sustains the plaintiff: proving the statement made by her to that witness, the defendant claims that it was true; if true, the representations of the messenger, accompanying his handing the instrument to the plaintiff, was a part of the act, and explains it; and, as an explanation, shows that the paper came back to the plaintiff through Mrs. Martin V. Boughton—a fact, which conclusively repels the idea that she had any interest in it (for, if she had, she must, according to Martin V. Boughton's testimony, have known it), and which the defense has proved. I am compelled by these considerations to the conclusion that the plaintiff was the intended, and is the grantee in this deed; and I must abide in this conclusion, unless it is controlled by two features of the defense, which I next proceed to notice.

The defense has introduced in evidence an instrument, which is dated December 10, 1875, purports to have the signature of the plaintiff, and declares that she never purchased the premises, that the deed was not delivered to her, and that she had not, and had never had any interest or claim in the premises or deed. She admits the signature. Though there is some discrepancy as to the place where, and the persons who were present when she signed, I readily find that it was done at her residence in Cheyenne, and that the only parties present were Martin V. Boughton, Levrett C. Stevens, Celia Bryant, and the plaintiff. Whether she signed, understanding the instrument, or ignorantly, and was misled in respect to it, is disputed: Martin V. Boughton and Stevens, the only witnesses for

the defense upon the subject, asserting that she signed understandingly, the former further stating that the instrument was fully explained to her upon that occasion; Mary E. Boughton and Celia Bryant, the only witnesses for the prosecution upon the subject, testifying in effect that she signed in ignorance, and under deception. Between these contradictions where is the truth? Martin V. Boughton swears that it was three years after the deed was executed—that is, as late as February, 1874, before he discovered the alleged error in it; and that it was about a year and a half later—that is, about December 10, 1875, before he took the step requisite to its correction; and that the plaintiff (to quote his words), “was glad to correct the mistake, and disclaim all right, title and interest in the property.” If the alleged error was an error, it is impossible that he should have remained ignorant of it so long; and utterly improbable that, having discovered it, he would not have made haste to obtain a correction—especially from a party whom he describes as eager to correct: the extravagance of this statement is conclusive that it is perjured: it condemns the rest of his evidence, so far as that residue relates to disputed matters, unless corroboration can be found for it in other parts of the case. I can find no corroboration, and therefore lay his testimony altogether aside, as failing to furnish any support for the defense. The statement of the plaintiff, on the other hand, is in entire accord with, and therefore is fully supported by the prior history of the deed, not only as found in her evidence, but as written in the conduct of Martin V. Boughton: to believe that she signed understandingly is to introduce such antagonism of fact, such contradiction and confusion into the case, as would successfully frustrate all rational effort to eliminate the truth, the existence of the paper points directly to the idea that she was deceived into signing it: she explains that she was called upon by Martin V. Boughton and Stevens to witness it, as a paper relating to some business, which was between themselves, and in which she had no interest; that,

Opinion of the Court—Peck, J.

believing them, she consented; it was then put upon the table for her to sign, and Boughton, holding his hand over and upon it, as if to steady it for her hand, but so as to cover its contents from her, she signed where they told her to; that the paper was neither read by, or to her, nor stated to her; she adds that no one wrote upon it on the occasion but herself, that they, having obtained her signature, went away with the paper, and that the interview lasted about ten minutes; according to this, she did sign in ignorance of the contents of the paper, and under deception, and the attestation by Stevens, which is upon the instrument, must have been put there after he and Martin V. Boughton had left—a circumstance that tallies with the idea of deception, for, had it been affixed in her presence, and in the usual way of regular and *bona fide* attestations, it would probably, at least might have attracted her attention, and put her upon her guard. Her explanation is plausible in itself; her credulous confidence as a woman, and her habitual trust in Martin V. Boughton, made it easy to deceive her; suspicious conduct, which might well escape her observation at the time, would readily occur to her afterwards, on discovering what the paper was; her explanation is corroborated by Celia Bryant, and is thus doubly fortified by the evidence of an eye-witness, and the antecedents and surroundings of the case. I cannot accept the deposition of Stevens as overcoming this volume of proof; letting alone the further fact that his evidence shows in several places the foot prints of a swift and more than willing witness. I have no doubt that Martin V. Boughton, when he delivered the deed to the plaintiff in 1871, intended to defraud her of it. Were it necessary to decide the matter, I should not hesitate to hold that his consent at Bryon to execute it was given with the mental reservation of this purpose; I have no doubt that in pursuance of the design he induced her, on the occasion of the delivery, to entrust the instrument to him for keeping; that he shrewdly calculated that she did not observe on that occasion the record filing, which is

obscurely endorsed upon it, and might easily have escaped her attention—and would never learn that there was any record evidence of the instrument; and that he intended to let time run upon the transaction, and hence the dead silence between them, upon the subject, between the delivery and the return, for the evidence does not hint that anything passed between them on it during that period; I can readily understand, and I fully believe, that the wife returned the document without his knowledge, and in this connection the fact that the husband and wife were inharmonious, is insignificant; I am clear that the scheme of the instrument of December 10, 1875, was formed to accomplish the fraudulent purpose, that he and Stevens conspired to obtain and did obtain it from the plaintiff by delusion, that Stevens was Boughton's professional hireling in the matter, and that they shaped their whole evidence in the case to conceal and to consummate their iniquity.

E. W. Mann testifies for the defense that in an interview in 1878, the plaintiff told him that the deed had not been delivered to her. This witness had conducted a suit to judgment for the defendant against Martin V. Boughton, based upon an attachment of the premises as his, — Boughton's—property; having obtained the judgment, caused an execution issued upon it to be levied on, and an execution-sale made of the property, as Boughton's; and under his the witness' advice the defendant purchased the premises at that sale, and took the deed, which constitutes one ground of his claim to title; and on the trial of the present issue, the witness, also counsel in this case for the defendant, as such counsel, for the edification of the court and the benefit of his client explained that the theory on which the claim in that suit was attempted to be enforced against the premises as Martin V. Boughton's property, was that the deed, Boughton to Boughton, had been made to his wife, leaving the title in himself. In estimating the evidence of Mr Mann I must see the attitude which he occupied towards the plaintiff during that interview, and by which he would be

Opinion of the Court—Peck, J.

likely to interpret it; I must see that he listened to her honestly, believing the deed had not been delivered to her, and that the paper of Dec. 10, 1875, of which he was then aware, had been understandingly signed by, and properly obtained from her. It does not follow from this, that he misapprehended her: it does not follow that he might easily have misapprehended her, and that misapprehension might reasonably be accounted for by a very slight difference of language. He states that he does not recollect all the conversation of the interview, and this circumstance deteriorates from the force of his evidence. To accept his testimony as controlling, I must accept it as controlling what otherwise is a continuous and consistent current of fact, flowing the other way; not as harmonizing conflicts, but as giving conflict to harmony. To accept his evidence then, would be to violate the established rule analyzing contradictory testimony. I do not doubt the sincerity of the witness: I am not satisfied of his accuracy.

The plaintiff being the grantee in the Boughton-Boughton deed, and the Martin V. Boughton title being by it vested in her, was it divested by the tax-sale? Is she bound by a tax put upon her property against a stranger, the tax proceedings being otherwise valid? Tax proceedings, being *in invitum*, are to be construed strictly; and whatever is essential to their validity must be affirmatively shown by the party who claims under them; *a fortiori* if it affirmatively appears that a requisite has been omitted from the proceedings; that will vitiate the alleged title. So far as the Boughton title was concerned, the tax authorities in the matter of the present title were notified by the record that Mary E. Boughton was, and that Martin V. Boughton was not the owner of the premises. In 1876 they were sold for delinquent taxes. From the listing to the sale, both inclusive, he was, and she was not described as the owner of the property taxed; it was taxed to him alone, and all the proceedings were against the property as his. The taxes were laid upon the right property, but to the wrong party—

against a stranger not the owner. He was not interested in protecting the property, and was notified; she was interested in the property, but was not notified; and thus the property was sacrificed by sale, though no delinquency had been committed. A sale of the realty for non-payment of taxes must be based upon a delinquency—a default. There can be no delinquency or default without prior notice to the owner, so as to enable him to pay and prevent sale: hence all the proceedings prior to sale must involve such notice, and connect the tax with the owner, so as to bind property and ownership. The statute, under which the present proceedings were conducted, embodies this principle; if the proceedings violate the principle, they are void. The act is ch. 109 of the Compilation; sections 1–4, both inclusive, declare what taxes shall be raised, and what classes of property shall be taxed. Sections 5–21, both inclusive, are provisions for listing the property as the basis of assessment; each goes to the same purpose, and all are therefore to be taken in connection; they proceed wholly upon the idea that property shall be listed to the owner, and can operate only according to that idea; section 22 provides that the assessment-roll, which is the list and the assessment affixed to it, shall specify the names of the party *to whom any property shall be taxable*,—which means of the owner; and in separate columns *his personal and real property*, which means the property of the owner; section 24, that a party refusing to furnish the assessor with a list of his real and personal property, or with a list of that which he represents as agent, guardian or otherwise, or to take the oath or affirmation prescribed in section 25, and to be administered by the assessor, shall be subject to a penalty; and section 25, that the oath or affirmation shall declare that the party has given in a full and correct inventory of all taxable property owned by him, and of all held by him in such representative capacity; section 26 requires of the assessor an oath, which shows among other things, that he has listed according to ownership: sections 23 and 29, that the assessor shall

return the roll to the clerk of the board of county commissioners by the first Monday of July: that the commissioners shall be a board for the equalization of the assessment of the several persons in the county, substantially in the same manner as is required of the Territorial Board of Equalization to equalize among the several counties of the Territory, as nearly as may be; for that purpose shall sit at time and place specified in the sections; shall add to the roll any taxable property in the county, not included in the roll as so returned, and assess its value—and may increase, diminish or otherwise alter and correct the assessment; “and shall hear and determine the complaint of all persons feeling aggrieved by the assessment of their property, as returned by the assessor;” and the clerk shall notify each party (or his agent,) whose assessment has been so increased, of the fact and amount of the increase, and that party may appear before the board at its next meeting for the purpose of obtaining a correction of the increase, and that any person feeling aggrieved by anything in the assessment of his property, may appear before the board within said time for the correction of the assessment—and that the assessor, when assessing, shall give each person a printed notice of the time and place of the meeting of the board; sections 33, 34, 35 and 38, that a tax-list and warrant shall be prepared, specifying the property taxed, the tax and tax-payer, and direction to collect accordingly; that the collector should demand payment of the tax-payer, before enforcing collection, and only in case of non-payment after a given date may enforce payment,—and that out of the personal property of the tax-payer; and finally, sections 41, 42 and 44, provide that all unpaid taxes shall become delinquent on the first day of November, and shall thereafter be payable to the county treasurer, who shall collect them by sale of the real estate; that, for the purpose of such collection; and as preliminary to sale, he shall give notice by advertisement and posting, specifying the land, and name of owner to whom taxed.

Clearly the provisions for listing and assessing to the owner, and securing to him a hearing before the board of equalization, which is a board of correction, who condition the validity of the tax, as a tax-binding lien, upon the property being taxed to him by name; and the provisions requiring the tax-list and warrant to be made out against the taxpayer, the collector to demand of him before distraining, and the notice of sale to run against him, must be treated as based upon, and as being in continuation of the prior expressed intent; and as assuming that under those prior provisions the owner's name shall be furnished, and shall pass from the roll into the tax-list, warrant and notice. Hence no delinquency or default can be committed by the owner, unless demand shall have been made upon him, and his personal property exhausted by the collector in accordance with the warrant. It is only through such delinquency or default that the land can be reached by sale. It is true that section 48 declares that "no irregularity or informality in the advertisement shall affect in any manner the legality of the sale, or the title of any part of the property conveyed by the treasurer's deed under the act, but in all cases the provisions of the act shall be deemed sufficient notice to the owner of the sale of their property;" but, though under this section the omission from the advertisement of the owner's name might not prejudice the sale, all the proceedings prior to the advertisement must conform to the statute, and to the principle which it proceeds upon, in order that its provisions may work such notice; in law, notice is protection against the defect of the advertisement, unless the efficacy of the sale was made to depend upon the validity of the proceedings which precede advertisement. Two considerations illustrate the necessity of taxing real estate to the owner, as a condition of validity; section 41 provides that the personal taxes shall be a lien upon the real estate, and according to the prescribed and necessary method of the roll and tax-list, the taxing of real estate to a stranger would fasten upon it his personal taxes; and constitutional

law forbids the levying of a tax, before the owner has had an opportunity to object to the assessment. The tax title is otherwise defective. The assessment, as returned by the county assessor, is inchoate. According to section 28 it must next be revised by the county board of equalization; and from that board, so revised, it must go under sections 30, 31 and 32 before the territorial board of equalization, whose duty it is to sit on the 4th Monday of July in the same year, and, with reference to the territorial tax, shall equalize county assessment between the counties and towns as to the valuation of real estate, by adding to the aggregate valuation of that property in each county where valued below its proper valuation, a percentum that will raise it to its proper valuation; and by deducting from the aggregate valuation of such property in each county, when valued above its proper valuation, such percentum as will reduce it to its proper valuation.

From this board so revised, it must be certified under section 32 to the county clerk, and the county commissioners are then, and not till then, and under section 33, to levy upon it the requisite taxes. The evidence contains proof of the making and return of the roll by the county assessor to the clerk, and that subsequently and in August of the same year (1876), the commissioners made this order, "that the following levy of taxes be made upon the assessed valuation of taxable property of Laramie county, for the various purposes and in proportion set forth below, as follows," and next follows in the order a schedule of rates for territorial and county purposes. The evidence contains no proof that the roll, as so returned by the assessor, was revised by either of the boards, or was put before either for revision. It is true that the clerk's certificate, attached to the tax-list, states that it was based upon the original assessment list, as revised by the county board; but though it may be proper for the clerk to certify the part for the assistance of the collector and tax-payer, the court must learn it, not by adopting the clerk's statement, but by the

evidence appropriate to establish it,—and that is the record proof, for each board is required to make a record of its revisions. Consequently it does not show that his assessment was perfected, and a basis existed for the levy of the 5th of August: for aught that appears, the levy was made upon the roll, or returned by the assessor, with nothing done to complete it, and as the proceeding next in order after the return. Further, section 33 forbids the commissioners from levying before the fourth Monday in August, unless the statement of revision has been earlier furnished from the territorial board—thus allowing till that date for the furnishing of the statement, as a basis of levy; the present levy was made on August 5th; hence, there being no evidence to justify the making of it before the fourth Monday, it was premature, powerless and void. This constitutes a radical error. Again, section one provides that two mills on the dollar shall be annually levied for territorial revenue, when no rate is directed by the territorial board of equalization; and that the tax for this revenue shall in no case exceed three mills on the dollar; so that the two-mills rate is the ordinary, and that directed by the board the extraordinary rate; the first to be presumed, the last to be specially proved. Sections 32 and 33 provide that the auditor, who is a member of that board, shall by the last Monday in August notify the clerk of the county commissioners of the rate of territorial tax that has been determined upon, and that, the clerk having received from the auditor a statement of the equalization and notice of the tax determined on by that board, the county board shall proceed to levy the requisite taxes accordingly; but that, if by that date, the clerk shall not have received notice of a rate as determined upon by the board, the two-mills rate shall govern. The evidence contained no proof that the territorial board had determined upon an extraordinary rate for the territorial revenues: and therefore no authority to the county board to levy the three-mill tax for the Territory. This constitutes a radical defect.

Opinion of the Court—Peck, J.

Again, the tax-list and warrant are to be founded upon the assessor's roll so revised, and the rates so applied to it, as above explained. The evidence contains proof that a tax-list and warrant were prepared, but no proof that before the sale any distraint was attempted, or demand made for the payment of the taxes levied against the premises; nor even that the list and warrant were delivered to the collector. This constitutes a radical defect.

It is unnecessary to consider other objections that may exist in the tax proceedings; it is apparent from what I have considered, that, as the evidence stands, the proceedings that preceded the sale, were void; consequently that sale was unauthorized and void, and the tax deed conveyed nothing.

I hold, therefore, that the plaintiff was, at the time of the ouster, legally entitled to the possession of the premises in controversy; that the ouster was illegal; and that she may recover the possession and the *mesne* profits. An order for such judgment will be appended at the foot of the findings.

I regret to deprive the defendant of the benefit of purchases, which he has made in good faith. I should more regret to deprive the plaintiff of property to which she is justly entitled.

Judgment affirmed.

Opinion of the Court—Sener, C. J.

JUBB v. THORP ET. AL.

BILL OF EXCEPTIONS: ALLOWANCE.—Under sections 300 and 303 of the Civil Code a bill of exceptions to be allowed must be presented to the court for allowance, and on a day not beyond the first day of the next succeeding term.

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

H. Garbanati, for plaintiff in error.

C. N. Potter, for defendant in error.

SENER, C. J. This case comes here upon a writ of error from the district court held in and for Uinta county. The facts are that the plaintiff in error here, brought before a justice of the peace in Uinta county an action of unlawful entry and detainer for certain premises; the justice gave her judgment of restitution and judgment for costs. She then appealed to the district court where the case was tried and certain findings made as of December 1, 1877; upon these on the 15th of July, 1879, the district court of Uinta county entered judgment for the defendants there, the defendants in error, giving them their costs amounting to \$17.40; to this judgment Jubb, by her attorney, excepted, and leave was given her until the first day of the next term to file her bill of exceptions.

The case was heard at the last term of this court on the defendant's motion to dismiss the writ of error on the ground that no proper bill of exceptions was signed, and that the court has no authentic record of the questions concerning said case.

This motion we hold to be well taken. As will be readily seen by inspecting secs. 300 and 303 of the Compiled Laws, a bill of exceptions to be allowed must be pre-

Opinion of the Court—Sener, C. J.

sented to the court for allowance, and on a day not beyond the first day of the next term: and, if true, the judge composing the court, is to allow and sign it. Now an inspection of what purports to be the bill of exceptions here will show that Judge Peck, who signed it, did not allow it or say it was correct; this he said he could not do, but moreover the permission to present a bill of exceptions in this case given by the district court of Uinta county at its July term A. D. 1879, was to present it at the January term A. D. 1880, on the 5th day of January at the county seat of said county, and to the court sitting there and for that county. So far from this being done and so complying with the statutes, what purports to be the bill of exceptions in this case is signed by Judge William Ware Peck at Cheyenne, on the 3d of January, A. D. 1880, not only outside of the county but absolutely outside of the jurisdiction of the court. Such a paper under the statutes of Wyoming cannot be treated as a bill of exceptions in any sense, and hence we find the case here without any bill of exceptions: wherefore the defendant's motion must be sustained, the writ of error dismissed, the cause discontinued here and the clerk of this court directed to notify the clerk of the district court of Uinta county that the judgment in this case entered in said district court at the July term, 1879, has become final by reason of this opinion and order.

Ordered accordingly.

Argument for Appellant.

THE UNION PACIFIC RAILWAY COMPANY v. RYAN, MARSHAL OF THE CITY OF CHEYENNE, AND THE CITY OF CHEYENNE.

TAXATION : MUNICIPAL : RAILWAYS.—The system of taxation for municipal purposes, is distinct and independent of that for state and county purposes. The act of the legislative assembly entitled, "An act in relation to the assessment of railways and telegraph lines," approved Dec. 13th, 1879, does not govern the city of Cheyenne in its taxation of property within its corporate limits for municipal purposes. The act was intended to affect county organizations, and not particular municipalities, or municipal corporations.

IDEM.—The property of railway and telegraph lines within the limits of the city of Cheyenne, is taxable in the same manner as other property in the city, according to the provisions of the city charter.

PRECINCT.—The words "precinct," "township" and "school district" as used in the act of Dec. 13th, do not refer to, or include municipal corporations.

ASSESSOR.—Where a power is given to a city council to levy and collect taxes, and no officer is provided, in a charter, as a necessary consequence the right to levy and collect taxes, would carry with it the power and authority to employ the necessary machinery for that purpose ; the city clerk of the city of Cheyenne, as *ex officio* assessor, had authority to make the annual city assessment.

UNJUST ASSESSMENTS : RELIEF.—Before a party can, or ought to have any standing in a court of equity to receive relief on account of unjust assessments by way of injunction, he should pay what is rightfully due. In this case the railway company failed to pay to the city of Cheyenne the taxes properly due, and therefore the complaint of unfairness furnished the company no ground for relief.

APPEAL from the District Court of Laramie County.

The facts are stated in the opinion.

J. A. Riner and C. N. Potter, for appellant.

The appellant, the City of Cheyenne, claims the right to assess for the purposes of municipal taxation the property of the complainant, situated within its corporate limits, whether it be located upon the company's right of way or

Argument for Appellant.

not, in the same manner as other property of the city is assessed, by virtue of the provisions of its charter, which gives it power to "levy and collect taxes for general revenue purposes not exceeding six mills on the dollar in any one year on all real, personal and mixed property within the limits of said city, taxable under the laws of the Territory." Session Laws 1877, page 40-41; Session Laws 1879, page 30.

In enacting the charter of Cheyenne in 1877, and the amendment in 1879, the legislature intended (and their language is clear) to grant to the city the power to regulate their own taxation independent of any other or general law concerning the subject.

In determining the proper meaning and application of the act of December 13th, the two acts, viz: of November 26th and December 13th, must be considered as if they constituted parts of one and the same act. It is a well established principle that statutes in *pari materia* passed at the same session of the legislature, must be construed together, the same as if they were parts of the same act. *Peyton v. Mosely*, 3 T. B., Mon., 77; *People v. Jackson*, 30 Cal., 427; *Smith v. People*, 47 N. Y., 330; 3 Neb., 312; *Commonwealth v. Griffin*, 105 Mass., 185; 6 Ind., 354; *Cain v. State*, 20 Tex., 355; 14 B. Mon., 166.

Statutes of other states referring to the taxation of railways, and by their terms leaning much stronger than ours toward an application to cities, have come under the scrutiny of the courts, and without exception, they have been interpreted as inapplicable to municipalities. *Dunleith and Dubuque Bridge Co. v. The City of Dubuque*, 32 Iowa, 427; *The City of Davenport v. The Mississippi and Missouri Railroad Co.*, (Judge Dillon's opinion), 16 Iowa, 363; *Ottawa v. County*, 12 Ills., 339; 20 N. Y., 387; *Brown v. County Commissioners*, 21 Pa. St., 37; Potter's Dwarries on Statutes, page 155; *McCool v. Smith*, 1 Black., 470.

But in this class of cases another principle has been announced, resting upon the principle concerning repeals by

Argument for Appellant.

implication, viz.: Statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities. Dillon on Municipal Cor'ps., sec. 54; 20 N. Y., 387; *State v. Brainin*, 3 Zab'r., (N. J.) 484 and 529; 3 Zab'r., 185; *State v. Clark*, 1 Dutch (N. J.), 54; *Baldwin v. Murphy*, 82 Ill., 485; *Bowen v. Lease*, 5 Hill, 221; *Louisville v. McKean*, 18 B. Mon., 9; *Railroad Co. v. Alexandria*, 17 Gratt. (Va.), 176; *Dunleith and Dubuque Bridge Co. v. Dubuque*, 32 Iowa, 427.

With reference to taxation, the word "precinct" has not an understood significance in Wyoming, and this act is the only place in which it is used in that connection. If it means anything, it surely refers to a "taxing precinct." Is Cheyenne a "taxing precinct" in the county as contemplated by this act? This act was adopted from Nebraska, and the word "precinct" is borrowed from that state. It has no ordinary meaning here respecting the subject of taxation. The contrary is true, however, in Nebraska. In that state, in the absence of this railway law, there are regular taxing precincts. The county is divided into assessing precincts, each having an assessor, and all the assessors make their report to the county, and these assessing precincts are independent of cities, and are solely for the purposes of county and state taxation—and for city taxation each municipality has its own assessors. See General Statutes Neb., 1873, sec. 2, page 353, as to precinct assessors; see General Statutes Neb., 1873, sec. 24, page 904, as to reports of precinct assessors; (but this last section does not refer to city assessors.) As to city assessments, see General Statutes Neb., 1873, sec. 29, page 119; sec. 59, page 157.

But this word "precinct" has received a judicial construction by the Nebraska courts. And it is there held that precinct in their statutes means "no more than the word, as ordinarily understood, imports, viz: territorial divisions or districts created for certain political and administrative purposes, but without the semblance of corporate character." *State v. Dodge County*, 10 Neb., 20.

Argument for Appellant.

It is a principle universally accepted in this country that as a general rule it is a fair inference that the legislature in adopting a statute of another state which has there been judicially construed, intended to give it the same interpretation it had there received by judicial construction. *Drenman v. People*, 10 Mich., 169; *State v. Macon County*, 41 Mo., 453; *Draper v. Emerson*, 22 Wis., 147.

It is certainly good authority that the ordinary meaning of the term does not comprise an incorporated power; it does not signify any corporate existence, and we submit that words must be construed in their ordinary and usual meaning. Sedgwick Const. of Stat. and Const. L., 224 N.; Potter's Dwarries on Statutes.

If, however, it is held that this act must be construed as applying to municipal corporations, then in thus legislating for such corporations the legislature has exceeded its rights; in other words, if at all applicable to cities, in so far the act is unconstitutional. The organic act of Wyoming says: "Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." Revised Statutes, sec. 1925.

It may be that the rolling stock of a railway has no situs or location, and thus a tax thereon may properly be proportioned between counties, cities, &c. This may be true to a certain extent with the railway track, but a building of stone or wood certainly possesses a definite situs or location. It belongs where it is erected. Suppose it is owned by the person who owns a railway track and rolling stock, does this fact alter its situs? We think not, and that it is a violation of the organic act not only, but of every principle of taxation and of justice, to proportion it for taxation among jurisdictions in which it is not situated.

Furthermore, it is an unequal discrimination in taxing different kinds of property, all of which are bound to receive equal protection and advantage from the city.

It is urged that the assessor acted without authority. As

Argument for Appellee.

to his right to sign as assessor, see *Lessee, &c. v. Freman Coates*, 10 Ohio, 278.

But the charter gives the council right to assess, levy and collect taxes in manner as may be provided by ordinance, and they possess all incidental powers, viz: to appoint some person to make the assessment. The clerk, by ordinance, is made *ex officio* assessor. And we submit that the assessor was legally acting as such.

He was in any event a *de facto* officer, and his acts cannot be collaterally attacked. *De facto* tax officers are particularly favored in this regard. Cooley on Taxation, 185, 186; *State v. Carroll*, 38 Conn., 449-471; *Commonwealth v. McCombs*, 56 Pa. St., 436; *Dean v. Gleason*, 16 Wis., 1; *Cocke v. Halsey, et al.*, 16 Pet., 71; *Brown v. Lunt*, 37 Me., 423; *Smith v. Messer*, 17 N. H., 420; *Lessee, &c. v. Coates*, 10 Ohio, 278.

W. W. Corlett, for appellee.

The first question presented in the case involves the proper construction of the act in relation to the assessment of railways and telegraph lines. (Session Laws 1879, pp. 13, 14, 15.)

This act was approved December 13, 1879. The defendants claim the right to make the assessment under section 1, page 80, laws of 1879, being an amendment to the charter of the city of Cheyenne, approved November 26, 1879.

9. "When there are two acts on the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy, as a repeal of the first, and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." *United States v. Tynen*, 11 Wallace, 92; *Schooner Paulina's cargo*

v. *United States*, 7 Cranch, 52-60; Sedgwick on the Construction of Statutory Law, pp. 194, 195, 199, 200, 201, 205, 219, 100, 102, 104, 105; Dillon on Municipal Corporations, sec. 54; Potter's Dwarrris on Statutes, pp. 143-5, 155-6; *Pierpont v. Crouch*, 10 Cal., 315. Under our law there is and can be no assessment or assessor of a precinct, except a city; it follows irresistibly, that the legislature meant by the use of the term precinct, a municipal corporation or city, provided of course, the term "city" may be included in the term precinct. Webster defines the word as follows:

1. The limit or exterior line encompassing a place; boundary; confine; limit of jurisdiction or authority.

2. A district within certain boundaries: a minor territorial or jurisdictional division; especially, a parish or prescribed territory attached to a church and taxed for its support. Worcester's definition of the word precinct is as follows:

1. A limit; a bound; a boundary; a border; confine.

2. A territorial division; a district.—Bouvier.

The word seems to have no technical legal signification in this country, and hence the legislature, independent of the suggestions already made, must have intended to use it in the sense of a territorial division or district in which the taxing power is exercised.

It is unnecessary to consider the question of express repeal of any provision of the charter of the city, because from what has already been shown there is an irreconcilable repugnancy between the railway assessment law and the amendment to the charter, which, according to the authority of *United States v. Tynen*, *supra*, works a repeal of the charter amendment so far as the assessment of certain railway property is concerned. See *Bank v. Bridges*, 1 Vroom (N. J.) 112; *State v. Miller*, *Ibid* 368; 33 N. J., 57-60; Dillon on Municipal Corporations, sec. 54; *Milford v. Godfrey*, 1 Pick., 91; *Weston v. Hunt*, 2 Mass., 500; *Lakin v. Ames*, 10 Cush., 198; *Parish of Brunswick v. Dunning*, 7 Mass., 444.

Argument for Appellee.

Perhaps the city without express authority might appoint minor officers of a ministerial or executive nature, but it could not appoint an assessor, because in making an assessment he acts judicially, and hence is not such an officer as the city might appoint without express authority given in the charter. Dillon on Municipal Corporations, sec. 146; *Hoboken v. Harrison*, 1 Vroom, (N. J.,) 73; *Ter. v. Ritter*, 1 Wyo., 318; Cooley on Taxation, pp. 288, 550, 552, 553.

It is conceded that for mere honest error in making an assessment whereby inequalities in the burdens of taxation result, the courts can afford no relief without express authority to do so; but when it appears that the party making an assessment "has been actuated by a fraudulent purpose, and instead of attempting to carry the law into effect, has wholly disregarded its mandate, declined to bring his judgment to bear upon the question submitted to him, and arbitrarily, and with intent and purpose to defeat the equity at which the law aims," it is manifest that a court of equity will afford relief in such a case. Cooley on Taxation, pp. 157-547; *Merrell v. Humphrey*, 24 Mich., 170; *Albany, etc., R. R. Co. v. Canaan*, 16 Barb., 254; *Buffalo, etc., R. R. Co. v. Erie County*, 48 N. Y., 93; *Western R. R. Co. v. Nolan*, 48 N. Y., 513; *Fuller v. Gould*, 20 Vt., 643; *Stearns v. Miller*, 25 Vt., 20; *Wilson v. Marsh*, 34 Vt., 352; *State v. Central Pacific R. R. Co.*, 7 Nev., 99; *Lefferts v. Supervisors of Calumet*, 21 Wis., 688; *Milwaukee Iron Co. v. Hubbard*, 29 Wis., 51.

The railway assessment law is valid and establishes the proper basis for the valuation of a railroad and the apportionment of the value among the different taxing districts. *Missouri River, etc., R. R. Co. v. Morris*, 7 Kansas, 210; *Missouri River, etc., R. R. Co. v. Blake*, 9 Kansas, 489; *Applegate v. Ernst*, 3 Bush, (Ky.) 648.

The whole subject of the method of valuing this species of property is committed to legislative discretion, and the courts cannot revise the action of the legislature or override its judgment. Revised Statutes U. S., sec. 1851; Cooley

Opinion of the Court—Sener, C. J.

on Taxation, pp. 274-5 and notes; *The Toledo & Wabash R. R. Co. v. The City of Lafayette*, 22 Ind., 262.

SENER, C. J. This was a suit in chancery instituted by the complainants against the defendants in the court below to restrain them from the collection of certain taxes claimed by the city of Cheyenne for the year 1880. The complainant asserts several grounds of equitable relief: First, it claims there was no lawful assessment of that portion of the complainant's property constituting its road-bed, right of way, superstructure, structures thereon, rolling stock, telegraph line, furniture and fixtures and personal property belonging to the appellee, who was the complainant below, the assessment being made by the city assessor, while it is claimed that it should have been made by the territorial assessment board, under the act approved December 13, 1879, of the Territorial Legislature of Wyoming, entitled "An act in relation to the assessment of railways and telegraph lines." Second, that in any event the so-called city assessor had no authority to make said assessment, no such office as city assessor having been provided for by the charter of said city. Third, that the assessment of the complainant's property upon which the tax claimed was levied, was grossly unfair, unjust and unequal, and was fraudulently made, with a fraudulent purpose and intent to make the complainant pay an unjust and undue proportion of the taxes collected in said city, all of which was done with a feeling of prejudice and hostility to the complainant. Fourth, that a portion of the taxes so claimed was levied upon a large amount of property not belonging to the complainant, but to another corporation,—the Colorado Central Railroad Company of Wyoming, which property last named was not in the jurisdiction of the city of Cheyenne.

To the bill of complaint filed by complainant, the defendants demurred:

1. To so much of the bill as relates to all the taxes complained of, except those claimed on account of the Colorado

Central Railroad Company, on the ground that the complainant was not entitled to any discovery or relief.

2. To that portion of the bill relating to the assessment of the property of the Colorado Central Railroad Company, and the taxes levied upon the same, on the ground that the complainant was entitled neither to discovery, nor relief by reason of the facts stated.

The district court for the first judicial district, Judge Peck presiding, having heard the case upon said bill of complaint and demurrer, entered a final decree thereon, adjudging the assessments complained of and all proceedings thereon null and void, and perpetually enjoined the defendant from attempting to collect the taxes levied thereon. The appellants appeal from said decree in its entirety, and not from any part of it.

The appellants concede that the decree is proper, and no contest is made as to the part of the bill relating to the taxation of the Colorado Central Railroad Company.

The first question which presents itself for determination by this court is: whether the city of Cheyenne for the purposes of municipal taxation had the right to assess the property of the appellee situated within its corporate limits in the same manner as other property in the city is assessed according to the provisions of the charter which gives it power to levy and collect taxes for general revenue purposes on all real, personal and mixed property within the limits of said city, taxable under the laws of the Territory, according to the terms of its charter as found in the Session Laws 1877, pages 40-41, or whether an act of the general assembly of 1879, passed on the 13th day of December of that year, to take effect on the 1st of January, 1880, in relation to the assessment of railways and telegraph lines, repealed the charter of the city of Cheyenne to that extent, and cast upon the territorial board of equalization, consisting of the governor, territorial treasurer and auditor, the duty of fixing the value of the property of railroad corporations for each mile of road or line, and thereafter required

all assessments of railroad and telegraph property to be made in conformity with the value as ascertained by this board of equalization.

In our opinion the statement in the syllabus of *Mayor &c. of Troy v. The Mutual Bank*, 20 New York, 387, that “the system of taxation for municipal purposes is distinct and independent of that for county and state purposes,” is not only sound law, but sound common sense. And this line of demarkation runs through all the legislation of the various states as well as of the Territory of Wyoming. An inspection of the 6th chapter of the Laws of Wyoming, passed at its sixth legislative assembly, on page 13 of those laws, shows that the governor, the territorial treasurer and auditor, are made a board of equalization evidently for the purposes of having uniformity in the assessment and taxation of railroad and telegraph lines within the several organized counties, and for county and territorial purposes only, and that that act in no wise worked or intended to work a repeal of the charter of the city of Cheyenne which was granted by the legislature in 1877. That act shows what the board was to do; that act prescribes what the president, secretary, superintendent or other principal accounting officers should do; it speaks of the duty of the assessor of the county or district, evidently meaning the district in the county in which machine or repair shops, or other buildings should be; it prescribes when it shall be done; it specifies that the territorial auditor shall certify to the county clerks of the several counties in which the property of the corporation, or any part thereof may be situated, the assessment so made of the property of such corporation, specifying the number of miles, and amount in each of said counties; and then the county commissioners are directed to divide and adjust the number of miles within each precinct, township or school district, in their respective counties; and then it goes on to give the county commissioners power to levy the requisite tax: all of which shows that the act was intended to affect county organiza-

Opinion of the Court—Sener, C. J.

tions, and not particular municipalities or municipal corporations. The county commissioners have no control over the cities. It may happen, and does happen, that the county commissioners are not citizens of the corporations; it could happen that every one of the county commissioners might be citizens outside of the jurisdictional limits of Cheyenne; and while it would be in the power of the general assembly of Wyoming by an express statute to confer the government of the municipality of Cheyenne upon any body that it saw fit, yet with a granted charter before it, this court cannot presume that county commissioners are clothed with any power or authority over the city of Cheyenne from that act. The only thing that gives color, or can be construed or suggested as giving this authority is the use for the first time in this Territory in a taxing act of the word "precinct;" and this it is seriously claimed may mean an organized municipal corporation.

Now, "precinct," according to Webster, means, "a district within certain boundaries," and in Massachusetts by old laws it had reference to the non-acceptance by the collector of the parish or *precinct*, and authorized the parish to proceed to a new choice. Bouvier says: "In old times it related to the district for which a high or petty constable is appointed in England;" and with this use of the word in modern acceptance it has been argued before the court that it may mean, and is intended to embrace and include, a repeal of the power of the city of Cheyenne to levy and assess taxes, as given to it by its charter, and to cast that burden on a board made up as before stated.

We do not think that such is the meaning, nor do we think any elaborate argument is necessary in stating it. If it be contended that the word township can be so construed as to mean an incorporated city, we answer, first, that no such ground was taken in argument at bar, and secondly, that township has a well defined meaning. *Vide* Abbott's Law Dictionary, viz. "a township is a subdivision of a county for county purposes, more highly or

ganized than a village, and less so than an incorporated city." The term "township" in cases there cited shows it never means an incorporated city. Of course there can be no pretence that Cheyenne of itself is a school district of Laramie county in any sense. The whole act from the first to the sixth section has reference to the uniformity of assessments and taxation for territorial and county purposes, and has no reference in our view to city purposes.

This brings us to the second proposition, to wit, did the city of Cheyenne assess the property as it had the right to do. Inasmuch as the complainant alleges that the board of equalization for the city acted fraudulently, it is not within our power to say, (inasmuch as the demurrer admits all that the complainant states), that the tax has been regularly assessed; but in so far as the question is raised as to the right of the city assessor to make said assessment, no such officer as city assessor having been provided for by the charter of said city, we answer that by the tenth section of the act of the incorporation of the city of Cheyenne, passed December 14th 1877, laws of the 5th legislative assembly, beginning page 37, the city is provided among other officers with a clerk: and by section thirty it is enacted that the duties, powers and privileges of all the officers connected with the city government, not herein defined, shall be defined by ordinance of the city counsel; and by an ordinance of said city as enacted February 4th, 1879, (of which this court takes judicial cognizance the published ordinances in printed form being before it,) *vide* 30th sub-division, 20th section, Act to incorporate city of Cheyenne, approved Dec. 14th, 1877, page 46, the city clerk is made *ex officio* city assessor; and this not only follows the law of the Territory, but follows the decision of the *Mayor, etc. of Hoboken v. Harrison, Harp and Walker* in the 30 New Jersey.

It is in the power of the council by ordinance to direct the mode and manner of the assessment and collection of its taxes; hence it results that where a power is given to a council to levy and collect taxes, and no officer is provided

in a charter, as a necessary consequence that the right to levy and collect taxes would carry with it the power and authority to employ the necessary machinery for that purpose. Having ascertained this much, we find the pretended city assessor, as the complainant describes him, had the authority to make the assessment complained of.

The third allegation of the complainants' bill: that the assessment of the complainants' property, upon which the tax claimed was levied, was grossly unfair, unjust and unequal, etc., being admitted by the demurrer we cannot do more here now than to lay down this proposition, which is sanctioned and sustained by all the decisions, that before the complainant can have or ought to have any standing in a court of equity to make such an assertion the complainant should pay what is due. This is laid down in *Heine v. The Levee Commissioners*, 19 Wallace, 655; by the *Alabama Gold Life Insurance Company v. Lott, Tax Collector*, 54 Alabama, 499; in 24 Michigan in *Merrill v. Humphreys*, 170; in 83 Ill., *The Pacific Hotel Company v. Lieb et al.*, 602; 2 Otto, 575, *State Railroad Tax Cases*. Now the complainant alleges in its bill of complaint that it tendered what was due, to wit, the sum of \$363.40. Even if the territorial board had had the authority to have made the assessment for the city of Cheyenne, of the property of the Union Pacific Railway Co. in and within the city of Cheyenne for city purposes, by the complainants' own bill this was insufficient, and was not the amount due. Complainant admits in its complaint that it owns within the city two and two-tenths miles; that it owns a branch road of one mile, making three and two-tenths; and it owns the property of the Denver Pacific Railroad, half a mile, which make three and seven-tenths miles; whereas in its summary in the concluding part of its bill, in which it puts the amount that it is justly assessable with under its theory of the law at \$29,600 (besides its real estate valued at \$2,000 by its statement), which is the assessment for three and two-tenths miles, and not for three and seven-tenths miles as it

Opinion of the Court—Sener, C. J.

admits in the opening part of its complaint: so that even upon its own theory of the law, and its own theory of its liability to assessment, it had not paid or offered to pay, when this bill was brought, what was due by the tax on four thousand six hundred and twenty-five dollars (\$4,625) at eleven and a half mills, the city rate, would be \$53.18: and by the complainants' own showing this amount was then due and payable, and should have been paid as a condition precedent to an injunction; and if the city clerk, acting as city assessor, had the right to assess the complainants' property subject to the authority and control of the council to correct and equalize said assessments, of course a larger amount would be due and owing as by complainants' own statements is shown in its allegations as to over-assessments: and this sum should be paid as a condition precedent to the awarding of any injunction to restrain whatever may be illegal and fraudulent as in complainants' bill is charged.

But the complainant alleges that the city council, acting as a board of equalization, unlawfully, wrongfully and fraudulently did pretend to correct and equalize the said assessment, as returned to it by said John K. Jeffrey, so that the same as equalized and corrected by said city council was as follows: 2 miles main track, road-bed, etc., \$8,000 per mile, \$16,000; 6 miles side track, \$5,500 per mile, \$33,000; leaving all other items in the said assessment to stand as returned by John K. Jeffrey; and they corrected and equalized the property formerly belonging to the Denver Pacific Railway and Telegraph Company: so the passenger depot was assessed at \$600; the rolling stock, proportional value in Cheyenne terminus, \$17,000; leaving all other items of the assessment as made by J. K. Jeffrey. Now upon an inspection it will be seen that Jeffrey, as assessor, had put down four miles of main track at \$8,000, and four miles of side-track at \$4,500. The full assessment of the eight miles by Jeffrey's assessment was \$50,000: as equalized and returned by the council it was \$49,000. The

Opinion of the Court—Sener, C. J.

complainant claims that the council acted unlawfully, wrongfully and fraudulently and yet makes no such allegation as to Jeffrey; and if the complainants' allegations are true, and for all the purposes of this consideration, standing upon a demurrer, it must be so considered, it will be seen that the city council absolutely reduced the assessment \$1,000 on these eight miles: so that the assessment as unlawful, wrongful and fraudulent as plaintiffs claim it to have been, corrected and equalized by the city council was absolutely reduced \$1,000. On the Denver Pacific the wooden passenger depot was put down at \$800 by Jeffrey, and reduced to \$600 by the city council; whereas the rolling stock, proportional value in Cheyenne was put down by Jeffrey at \$10,000, and by the council raised to \$17,000, an excess of \$7,000: so that putting one against the other it will be seen that the increase by the council over Jeffrey's assessment was the sum of \$5,800. Now, as the complainant alleges that this was done unlawfully, wrongfully and fraudulently, and inasmuch as it is conceded that there was no authority to assess the property of the Colorado Central to the Union Pacific Railway Company, and as the demurrer, for all purposes of this case so admits,—yet, as the bill on its face shows that the complainant has not paid the taxes fairly conceded, or shown to be due to entitle it to be heard in a court of equity, and as it may have a case, upon a proper bill for relief in equity,—whilst this bill, in our opinion, will have to be dismissed, and the injunction awarded will have to be annulled and set aside, yet in doing so the court will follow the supreme court of Michigan in *Merrill v. Humphrey*, 24th Mich., page 170, while ordering the decree of the court below to be reversed and the injunction to be dissolved, but the bill is to be dismissed without prejudice. The appellants to have their costs in both courts.

Decree reversed.

Opinion of the Court—Peck, J., dissenting.

PECK, J., dissenting.

The bill was brought by the above named company in the district court. It states that the Union Pacific Railroad Company was incorporated under Federal statutes for the construction and operation of a railroad and telegraph line. That afterwards and by 1869 the company located and built its railroad and telegraph line from Omaha westward through this Territory to a point of union with the Central Pacific Railroad, which was being built eastward from California; and that it and the telegraph line were accepted by the Federal government all in accordance with the charter, and that since their completion they have been so operated. That the construction of the road and line was necessary to the public service of the United States: the principal object sought for and obtained by the incorporation and the construction of the road and line, being to secure to the government the transportation of its dispatches and the safe and speedy transportation of its mails, troops, munitions of war and public stores through a country remote, then unsettled and uninhabited, accessible only by great difficulty and expense, and wherein there were no facilities for accomplishing those purposes. That in accordance with the charter and on January 24th, 1880, the Union Pacific Railroad Company was consolidated with two corporations, the Kansas Pacific Railroad Company and the Denver Pacific Railway and Telegraph Company, under the name of the Union Pacific Railway Company, which is the orator; and that by the consolidation the latter became possessed of all the franchises and property of the three companies. That the orator's main line, the road and telegraph line so constructed by the Union Pacific Railroad Company runs through the city of Cheyenne for the distance of two miles and two-tenths of a mile; that it owns without the city a branch railroad track of the length of one mile, a railroad track formerly belonging to the Denver Pacific Railway and Telegraph Company

 Opinion of the Court—Peck, J., dissenting.

of the length of one-half mile, and six miles of side-track. That Cheyenne is a municipal corporation, created under sundry acts of the territorial legislature.

That the clerk of the city returned to the common council for 1880 an assessment against the orator, which was equalized and corrected by the council, and as equalized and corrected assessed the orator for property described as follows; and which tabulated from the bill:

Two miles main track, road bed, &c.	
One-half mile of main track, formerly that of the Denver Pacific Railway and Telegraph Company.	
Six miles of side-track.	
One mile of road to military depot.	
Proportional value of rolling stock used on the Colorado Central Railroad.	
Proportional value of rolling stock used in Cheyenne as terminus.	
One hotel	
Four depots, passenger and freight, and appurtenances.	
Round house and appurtenances	
Six dwelling houses	
Frame building.	
Water and wood depot and appurtenances.	
Express office and furniture.	
Telegraph poles	

the assessment specifying a value to each item of said property, the aggregate value being \$226,900. That the assessment so returned, corrected and equalized, included also lands of the orator, which were located within the city, and without its right of way: which said lands and tabulated items were all the property that was embraced in the assessment as the orator's. That the council has levied taxes on the equalized and corrected assessment; and the city clerk has delivered to said Ryan, the city marshal and *ex officio* tax collector, for their collection, a tax list, certifi-

Opinion of the Court—Peck, J., dissenting.

cate and warrant, issued against the orator. That said proceeding of levy and assessment and issuance and delivery of the tax-list, certificate and warrant were had in pursuance of an ordinance of the city. That, excepting the Colorado Central Railroad rolling stock and the lands, the property so assessed to the orator consisted of its right-of-way of road and line, all structures situate thereon (the road bed and superstructure thereof included), its rolling stock, side track, telegraph lines, furniture, fixtures and personal property located within the city; that the Colorado Central Railroad was, at the time of making the assessment, owned and is now owned by the Colorado Central Railroad Company, a corporation distinct from the orator, and its road not extending within the city limits. That the total of the taxes levied against the orator upon the assessment, is \$2,888.14, of which \$253.58 are upon its said lands, located within the city and without its right-of-way, and \$86.25 for the Colorado Central Railroad rolling stock. That of the taxes, the orator has paid the \$253.58 and \$363.40 of the residue of the total of the levy, and has been discharged by the city *pro tanto*, leaving outstanding, and exposed to enforcement, \$2,271.16; and that the collector threatens to enforce forthwith the collection of this balance. That the orator owns a large amount of lands in the city outside of the right-of-way, which lands are in the market for sale, and the sale of which are embarrassed by the lien that stands upon the lands because of the taxes under the territorial laws. That the territorial board of equalization assessed and valued the orator's property, consisting of the right-of-way of its said roads and telegraph lines, the structures situated on said right-of-way—side track and superstructures included—rolling stock, telegraph lines, furniture, fixtures and personal property, for each mile of said roads and lines; determined the value of each mile thereof by dividing the sum of the valuation by the number of miles of road and line; and thus ascertained the value of each mile to be \$9,250: which assessment and valu-

ation were made for 1880. Upon those facts the bill complains and specially designates that the orator is exposed to varied injury, which is irreparable at law; and asks for special and general relief here, including relief by injunction.

The defendant demurred to the whole bill for want of equity. Upon that issue the district court passed a decree, which, reciting that the city had assessed that year against the orator certain property, itemizing it as it is itemized in the above tabulation, with the exception that it omitted the "one-half mile of main track formerly belonging to the Denver Pacific Railway and Telegraph Company," and adding the itemized valuations, as they appear in the bill, with the exception that the recital specified a valuation of \$2,500 for the "Round house and appurtenances," instead of \$25,000, the actual valuation—further reciting that the recited property was the same that was claimed in the bill as only assessable by the territorial board of equalization, that the city had levied taxes upon the assessment, and against the orator, of which a part was unpaid, and had issued a certified tax-list and warrant for the collection of that part—decreed that the assessment, taxes, tax-list, warrants, and all proceedings theretofore had thereon, or on any of them by the city, Ryan or any of their representatives, were void and null; that they were thereby annulled and vacated; and that the city, Ryan and each of their representatives were perpetually enjoined from all attempt to execute the warrant, enforce the collection of any of the taxes, or use the assessment. It is clear that the decree was intended to be a sweeping decree against all the assessment but the part relating to the lands, and against all the outstanding taxes; the item of one-half mile of main track of the Denver Pacific Railway and Telegraph Company having been omitted, and the value of the round house and its appurtenances misstated in the recital by inadvertence.

What the symbol, "&c.," means in the assessment item, described as "two miles main track, road bed, &c.," it is

Opinion of the Court—Peck, J., dissenting.

impossible to understand; the use of the symbol in assessment description is vicious and unlawful; the tax-payer cannot be assessed by expressions which conceal the property assessed, and serve equally to cover something and to cover nothing; and whether the objection might or might not have been reached here, had the assessment specified separate values for the “&c.,” and the residue of the item—yet, as but one value was extended in gross against the item, should it result that the residue was beyond the assessing jurisdiction of the city, the objection for defect of jurisdiction will necessarily cover the whole item. Again, though no right-of-way *eo nomine* appears in the assessment, the latter is consistent with the allegation of the bill, that all the property assessed to the orator, except the lands and the Colorado Central Railroad rolling stock, consisted of its right-of-way and the structures situated thereon—side track, road bed and superstructures included—its rolling stock, telegraph lines, furniture, fixtures and personal property, located in the city. The assessment of the lands is conceded to be correct; the validity of the rest of the assessment is denied. The defendants justify the part so denied, under section 1, at page 30, of the Laws of 1879, of the statute of November 26th of that year, amending the city charter of December 14th, 1877; which section declares that it shall have power to assess, levy and collect taxes for general revenue purposes, on all real, personal and mixed property within its limits, taxable under the laws of the Territory; that, to compel payment of taxes it may distrain and sell personal property; that all city taxes shall be liens upon the lands of the tax-payer; that the city may sell for taxes lands so under lien, and convey them to purchasers; and may attach a penalty to delinquent taxes; and may, by ordinance, provide for the exercise of these powers. The orator claims that the property which is embraced in that part of the assessment whose validity is controverted, can be assessed only under the statute of December 13th, 1879, entitled, “An act in rela-

Opinion of the Court—Peck, J., dissenting.

tion to the assessment of railways and telegraph lines," at page 13, of the Laws of 1879. The two statutes relate to the same subject matter: and the question—under which of them was the disputed property assessable?—turns upon the inquiry, whether the act of November was repealed by that of December, as to the description of property that is covered by the latter; if not repealed, the city had—if repealed, it had not jurisdiction to make the assessment; and in the latter case the assessment is void.

I will first consider the question by treating the earlier act as special, and the latter one as general. Section five of the latter declares that "All acts and parts of acts, providing for the assessment of the property of railroad and telegraph companies, and the equalization of assessments inconsistent with the provisions of this act, are hereby repealed, so far as they provide for the assessment and equalization of the property of said railroad and telegraph companies." As the section makes inconsistency the test of repeal, it brings us directly to the rule of repugnance. The appellants claim that a prior special act passed for the benefit of a municipality cannot be repealed by a subsequent general one; but the proposition is wholly untenable. Implied repeal is not favored, because of the presumption that had the legislature intended its repeal, it would have said so in direct terms, and because of the difficulties and hazards which attend the application of the rule of implied repeal. The disfavor increases between a special and a later general statute, because of the other presumption that as between special and general terms on the same subject, the special was intended to control. But whether the prior law be general or special, an implied will dispense with the necessity of an express repeal, provided implication applies in the given case, and is complete in itself. The two laws being upon the same subject matter, the whole inquiry is one of intent. If the later law intends to terminate the earlier, the effect must necessarily follow; for the legislative will being supreme within its sphere, its latest expres-

Opinion of the Court—Peck, J., dissenting.

sion on the same subject must prevail; and it is a mere difference of form, and therefore immaterial, whether that will be expressed directly or indirectly. But to rise to the force or equivalence of direct expression, the implication must be necessary—unavoidable; it can be such only when the two acts are repugnant—irreconcilable. If after thorough comparison they remain in this antagonism, the intention is manifest, and as the later must operate, the earlier must yield. Repugnancy being the criterion, it must rule the prior statute as much, if special, as if general.

The following are tests: is the new intended to be a revision of the old? if it is, it is a substitute for the old; or, the two being upon the same subject, does it introduce a new, and what is clearly intended to be the sole rule upon the subject? If it does, it displaces the old; do the statutes confer the same power upon two different public bodies, and one which cannot consistently, with the clear object of the legislature, be exercised by both? If so, the later must prevail; can the later be satisfied without infringing upon the former? if not it overrules it. The following cases show that what I call tests, are adjudicated propositions; the 13 How., 412, *Norris v. Crochet*, and 11 Wall., 88, *United States v. Tyner* held that, if the new statute covers the entire subject matter of the old with changes, it is a substitute for it; the 11 Wall., 652, *Henderson's Tobacco* that, if the new contains new provisions on that subject matter, plainly showing an intention to operate as its substitute, it repeals it; the 33 Pa., 81 and 511, *Wheaton's Estate*; 15 Cal., 294, *Sacramento v. Boid*; 40 Miss., 268; *Swann v. Burke*; 15 Gray, 54, *Weeks v. Walcott*, that the later repeals the former act if it introduces a new rule on the same subject matter, which it intends shall be the only rule upon it; the 12 Allen, 480, *Commonwealth v. Killiher*, that the new repeals the old, if it revises it with slight variations; and the 12 C. B. N. S., 161, *Daw v. Metropolitan Board*, that, where the same power is given by different statutes to different public bodies, and cannot be exercised by both consistently with the

Opinion of the Court—Peck, J., dissenting.

legislative object, the later statute will prevail. These tests are different statements—varied illustrations of a rule, which turns upon one central element—a repugnancy which, wherever it exists, inevitably works repeal. This has been and is the uniform rule in the supreme court of the United States announced in the cases already cited and in others, and therefore governs here, whatever the law on the subject may be elsewhere. But from the nature of the subject it must be the universal rule. Remarks are made by judges and authors occasionally, which, considered in the abstract, countenance the appellant's proposition, but which considered in their connections, oppose it. The sum of the matter is, that whatever embarrassments attend the rule relate not to its existence, but to its application.

Again, treating the rule of implied repeal as existing at the common law, I regard the repealing section in the act of December 13th as declaratory; but, if the rule did not exist, so that without this repealing provision a repugnance between the two acts would not work repeal, the provision would constitute a rule, and, there being repugnancy, work repeal.

Does this act repeal the first section of the act of November, in respect to the property which the former commits to the territorial board of equalization for assessment? Are they in conflict in respect to jurisdiction over this property? The former act directs that every railroad and telegraph company, having property in more than one county of the Territory where the company is assessed, is to furnish the auditor by July first, annually, for assessment and taxation, a list of the following property belonging to the company in this Territory—the right-of-way, all structures situated therein (side track, road-bed and its superstructures and telegraph lines included) rolling stock, furniture, fixtures and personal property; the list to specify the number of miles of road or line within the Territory, and the number in each organized county in the Territory; that such return not having been made, the auditor shall procure the prescribed information; that the list having been furnished,

Opinion of the Court—Peck, J., dissenting.

or information procured, the territorial board of equalization shall assess and value the property, so returned to it, for each mile of the road or line, and for that purpose shall consider the list furnished by the company, or the information procured by the auditor, and such other reliable information as it can obtain upon the subject; and shall ascertain the value per mile by dividing the total of valuation by the total of the miles of the road or line. The unmistakable intent of the provision is, that in ascertaining the total and the mile valuation, the board shall treat the right of way, all erections and improvements within it, the rolling stock, furniture, fixtures and personal property as the component parts of that whole; and the miles as of equal relative value. This method of valuing a railroad or telegraph line for taxation, considers the road or line as a unit or an entirety; each part as inseparable from all the other parts; as dependent for its own value upon all the other parts; and as contributing equally with every other equal part, to the value of the rest; and the component items of right-of-way, erections and improvements therein, rolling stock, furniture, fixtures and personal property as the component items of the equal parts of the road or line in equal degree. The method then is to value the whole by equalizing the values of the parts; and proceeds upon the only correct principle. From its very nature the principle calls for uniformity of application. It applies with equal reason to one part of the Territory as to another,—to a taxing district within a county as to a county; so far as the application is not uniform the principle is an idle abstraction, and the exception senseless and unjust. The adoption of the principle thoroughly indicates an intention to inaugurate it into an uniform rule; and unless some other provision limits the action of the principle, it must be because there is nothing to prevent its being the uniform rule.

The charter declares that the city may assess as it shall provide by ordinance; that is, that the city may assess at will; for the purpose of assessment, it empowers the city

Opinion of the Court—Peck, J., dissenting.

to treat a portion of the road or line as a unit—an entirety; and an inseparable part as a separated whole. The city exercised this power by the ordinance under which its present assessment was made. Regarding each assessment as correctly, and therefore as fairly made under its principle, no more striking illustration of the mischief and wrong of ununiformity, and the justice and necessity of uniformity can be desired, than is presented by the discrepancy between the assessments,—the city valuing at \$226,900, property which the board values at less than \$34,225, the difference resulting from a disregard of the principle of equalization,—and the appropriation to the city as a basis of taxation more than \$192,675 of value, which belongs to the rest of the road and line, outside of the city, by the rule of diffusion—the rule of the unit, the entirety; and no more belongs to the city, than it would, if this difference of value represented, locally returned beyond the city limits. The discrepancy is rendered more striking by the fact that the city assessment embraces no personal property, furniture or fixtures—unless the item of appurtenances, specified in the assessment in connection with passenger, freight, water and wood depots, cover them, and except also the furniture of an express office; while the board assessment embraces personal property, furniture and fixtures generally. As the orator's road and line run within the same right-of-way, the mile valuation must be taken to cover the two in the board valuation.

The history of the legislation in the Territory upon the subjects pertains to the understanding of the act of December 13th, in respect to the extent of its application. The theory of all the statutes approved before December 13th, 1879, and beginning on December 10th, 1869, for raising territorial and county revenue by taxation of a railroad company, whose road ran into more than one county, was, that all its property, actually located in a county, should be assessed to that county, as a unit or an entirety of value, separate from the company's property located in the rest of

Opinion of the Court—Peck, J., dissenting.

the Territory; except only the rolling stock, which was to be porportioned to each county in the proportion of the number of miles in the county to the length of the road. The orator's main road only has passed into more than one county of the Territory, its telegraph line being practically a part of it; while the theory of territorial and county revenue system was not confined to this road, it embraced the road, and the latter must have been in special view of the legislature in the adoption of the theory. The school acts, beginning with December 10th, 1869, provided for school district taxation, based on the county assessor's return, without prescribing the principle or method of assessment to be observed by him; up to December 10th, 1873, he could, and afterwards was obliged to return the school district and county assessments together, and would naturally make the former, as he did the latter; the most expensive, and therefore the most onerous school districts have embraced the most populous sections, and thus the course of this road. The general act of December 16, 1871, for the incorporation of towns and cities, in providing for their municipal taxes, required the county assessor in making up the county rolls, to note against the name of each taxpayer all the property owned by him, within the municipal limits: so that the municipal followed the rule of the county assessment in respect to railroad property. The first charter of the city of Laramie, passed December 13th, 1873, empowered the board of trustees to make such ordinances, consistent with the organic act and the other laws of the Territory, as should be necessary to the government of the city, rendering the board in the first instance the judge of what would be necessary; and the charter also required the city assessor to assess all property liable to taxation in the city, (and that included railroad and telegraph property), under such regulations as the board should prescribe; and to return his assessment to the board, by whom it should be revised; the second charter, passed December 29th, 1875, conferred upon the board the same power to make

Opinion of the Court—Peck, J., dissenting.

ordinances; required the city assessor to assess at the true cash value, and return his assessment to the board, which was to be a board of revision, with the amendments of 1877 and 1879 to this charter, leave it unaffected in these particulars of power. The two, being all the charters of Cheyenne passed severally on December 10th, 1869, and December 14th, 1877, confer upon its board of trustees like powers to make ordinances, and provide that the assessment shall be made in such manner as the board shall prescribe; and the amendments to the charters left them unaffected in these particulars of power. Their respective charters authorized those two cities to assess in their judgment, and directly invited them to assess upon the principle not of unity, but of separation. Prior to December 13th, 1879, the only board of territorial division was the Territorial Board of Equalization, but its jurisdiction was limited to revising the county assessments of real estate, to equalizing by adding to the aggregate valuation of a county, so far as it was undervalued, and deducting from that aggregate so far as it was overvalued; and it is at least seriously questionable, whether this power was not confined to making a real estate basis of valuation for the Territory. But this jurisdiction of the territorial board was not intended to serve, nor did it serve the purpose of assessing a railroad or telegraph line which extended into more than one county, as a unit of value, because it took in property which was without, and excluded property which was within the writ. Thus the statutes stood until December 13th, 1879: the several taxing districts bound to no common rule of assessing this road and line—some required and the rest permitted to assess against this principle of unity—upon the principle of separation. It necessarily followed that some districts were deprived of values that were due to them; and that others appropriated values that were in excess of their dues; and, that where no bad faith was intended against the company, valuations would often, for want of a common standard, be inflated. A more complete system of unequal taxation could hardly

Opinion of the Court—Peck, J., dissenting.

be devised, than is presented by this mass of ununiform, incongruent legislation. This condition of the statutes constituted an imperative need of corrective legislation, and put upon the legislature the duty to supply it by a unifying system. I am compelled to say that the act of December 13th, 1879, so far as it has been analyzed in this opinion, meets this want and satisfies this duty. Let us next see how its further provisions bear upon the idea that it intended to correct the evils by becoming the future rule of all the taxing districts.

The statute next provides that, after the territorial board of equalization shall have so assessed and valued the road and line, the territorial auditor shall certify to the clerk of each county in which property of the company is situated, the mile assessment, so made, the number of miles in each county, and the aggregate of the assessment due to the county; and that "the county commissioners shall therefore divide and adjust the number of miles and the amounts falling within *each precinct, township and school district* within their respective counties; and cause such amount to be entered and placed on the lists of taxable property, returned by the several assessors;" as the county proportion of the assessment is usually certified to by the county clerk, a subsequent provision of the act requires the county commissioners, in levying the county taxes, to treat it as a part of the general county assessment; as the apportionments to the precincts, townships and school districts go directly upon their assessment lists, it follows that the taxes thereafter laid on those lists embrace these apportionments. What then does "precinct" here mean? Presumably it was inserted in the text, to assist in the expression of its intent; unless it can be shown to be meaningless, or that it must be cast out, in order to give effect to the text, the court is no more at liberty to ignore it, than it is to strike it out, to alter, to reconstruct the statute; it is conceded that it has a function in presenting the sense of the act, that effect must be given to it, so as to give effect to the

Opinion of the Court—Peck, J., dissenting.

act; indeed apportionment must be made to the precinct by the command of the statute: it is also conceded that "precinct" means, as it stands in the text, *taxing precincts*—the same as if the text so read. "Precinct" in its textual connection, is relative to county: signifies a *minor territorial or jurisdictional division*: is a generic term, to which "township," "school district," are specific, and in which they are included, and a taxing territorial jurisdiction or division is a taxing district. Hence the textual rendition is that the commissioners shall apportion to every township, school district, or other minor taxing district, the number of miles and valuation aggregate, that fall within it, and cause the same to be entered upon its assessment roll. If more clearness is needed to this interpretation of "precinct" as a functional term in the text, it is furnished by the prefix, "each:" the reading is, "each precinct." Cities are thus included, as taxing districts, as clearly and completely as if they were specified *eo nomine*.

What does the word "township" here mean? Unquestionably it signifies in its connection, not an unincorporated division of a county, but an existing municipality; one of its senses is the corporation of a town, and this is the sense in which the statute employs it—the same as if the reading was "town" instead of "township." "Town" means or includes "city" in a statute, if the sense so requires. In many of the states of the Union the terms, "town," "city," as law terms, are synonymous. In England, "city" means "an incorporated town." In the generic sense of incorporations the terms are equivalent, but there is a technically specific sense, in which they differ, "town" being a municipality whose municipal laws and regulations are established by the popular vote of the town, and entrusted for execution to officers, elected by that vote; and "city" a municipality, where the making and execution of the municipal laws and regulations are committed by the popular vote of the city to its officers elected by that vote. Now between these generic and specific senses, the statute should be read in the

Opinion of the Court—Peck, J., dissenting.

former as the broader sense, because it is a corrective statute; therefore a liberal construction, the better to effectuate the intended remedy; the statute is corrective because it was passed not to declare, but to change the law; this assumes that the change was intended to supply a want; the want was a mischief.

Again, the charter of Cheyenne made it a city in the specific sense; the amendments leave the characteristic; and "town" is not used in the charter or amendments; the charter of Laramie made it a city; the amendments,—they are only to the second one—leave the characteristic; but throughout the charter and amendments, "town" and "city" are constantly used and as equivalents; these charters were modeled on those of Cheyenne: the act December 11th, 1873, incorporating Evanston, made it a city in the specific sense; was modeled after the first charter of Cheyenne; but it designates it as a town—that term, not "city," only being used in the act; the act of December 16th, 1871, "For the Regulation of Towns and Cities," which is a general incorporating act, uses the terms synonymously. I have searched exhaustively the territorial statutes, and have found no instance in which they are not used in the same sense.

I conclude that the act of December 13th was intended to be a revision of, and a substitute for the prior acts upon its subject matter; that it introduced a new, and what it clearly intended should be the sole rule upon that subject matter; that it and those prior statutes confer the same power upon different public functionaries, one which can not, consistently with the clear purpose of the legislature, be exercised both by the new and the old; that the act of December 13th cannot be satisfied without infringing on that of November 26th and the other previous acts; that the act of December 13th is repugnant to, and irreconcilable with that of November 26th, and those other acts; and repeals them to the extent of the repugnancy; and that the effect of the repeal, as to the act of November 26th, was to

Opinion of the Court—Peck, J., dissenting.

transfer the jurisdiction, which the city of Cheyenne had anterior to January 1st, 1880—the date at which the repealing act took effect—for the assessment of the property that is covered by the latter act to, and exclusively vest it in the territorial board of equalization: and consequently that the assessment which was made by the city of the orator's property, above tabulated in this opinion, excepting the Colorado Central Railroad stock, and all the proceedings based upon the assessment, are without jurisdiction and void.

As to the last mentioned stock; the assessment of that is void for the same reasons, irrespective of, and without passing upon the effect here of either of the facts, that it did not belong to the orator, and that the road did not extend within the city limits.

In the conclusion that the statutes of November 26th and December 13th are repugnant, I have treated the latter as general legislation, thus subjecting it to the most rigid test of its meaning, and considering it most favorably for the appellants; but the latter act is special in each of its particulars, the property covered by it, the method of listing, the principle and method of assessing, the method of apportioning the assessments, and the board empowered to assess; both acts being special the repeal more clearly follows.

I think however, that the act of November, though special as a municipal grant, is general in its grant of power; while that of December is special in its grant of power; hence the presumption that general yield to special words, shifts from the later to the earlier statute; and we find as the real starting point in the comparison, that this presumption is against the earlier, and in favor of the later statute; thus the repeal still more clearly follows. The case of the *State v. Jersey City*, 25 New Jersey Law Rep., 170, bears directly on this proposition; the general powers as they were construed to be, conferred upon the city by its charter, being held to be controlled by the special ones, as they were construed to be, which were conferred upon the railroad by its charter.

Opinion of the Court—Peck, J., dissenting.

The disputed assessment being jurisdictionally void, it was the duty of the district court to vacate it, the taxes which were based upon it, and the liens which were apparently created by the taxes; and to stay the collection of the latter. The decree rendered below, should therefore be affirmed, but with a modification embracing the one-half mile of the main track of the Denver Pacific Railroad and Telegraph Company, and rectifying the misstatement of the value of the Round house and its appurtenances.

The foregoing conditions render it unnecessary to consider a further ground of relief, which is claimed in the bill, namely, that a portion of the property, the jurisdiction to assess which is claimed, was fraudulently assessed.

The majority of the court decide that if the bill presents ground for relief because of either the want of jurisdiction or the presence of fraud, it concedes an equity to be due from the orator to the defendant in respect to a part of the taxes, which the city levied upon that property. The territorial board assessment per mile was \$9,250; the total of miles within the city, $3\frac{7}{10}$; total assessment for it \$34,225; aggregate of the rates, laid by the city on the assessment which it made .011 $\frac{1}{2}$; the orator paid upon the amount so resulting, \$363.40, which last sum it alleges was the sum of taxes justly and equitably due from it to the city upon a just and lawful assessment of that property. Upon these data that majority hold that the orator should have paid toward those supposed taxes, and on the basis of the territorial board assessment, and according to its own theory \$53.18 more; therefore in all \$416.58; the \$53.18 thus constituting the unsatisfied equity. But upon those data the orator should have paid, if under any equity in the premises, only \$393.52, and its payment was deficient only to the amount of \$30.19. The difference in the sum of deficiency does not affect the principle. If there was an equity, there was a deficiency, and the orator is not entitled to relief. But there was no equity. One of the self-evident principles of taxation is, that a basis for taxing,—a completed assess-

Opinion of the Court—Peck, J., dissenting.

ment—must exist before a tax can be levied; because a tax is relative, is intended to raise a given amount of revenue, must be laid to produce, as nearly as may be, a given amount of revenue, without excess or deficiency, and the rate must be selected accordingly: hence, the basis must be ascertained before the rate can be determined,—must precede the rate. The proposition of the existence of the alleged equity, assumes that the city had not, and that the territorial board had the jurisdiction to ascertain the assessment; that the act of December 13th was the only rule upon the subject. Therefore that rule must be observed before an assessment can result. To produce the result, the portion of the territorial board assessment due to the county, must be certified down to it from the board; and out of that proportion the part due to the city must be placed upon its list by the county commissioners in order that it may authoritatively get there: until that has been done the city cannot have, and when that has been done, the city has a completed assessment against the company of the property in question. There is no indication in the bill, that the city had received its proportion from the county, or that the latter had received its from the board out of the assessment for 1880,—none, unless it is to be found in the allegation of the orator's claim, that the \$363.40 paid upon the taxes, fictitiously raised by the city on its assessment, were the amount of taxes justly and equitably due from it to the city upon a just and lawful assessment of the property; but that allegation cannot consistently be held to admit a fact to which it is directly antagonistic. This is the sense of the matter as the case stands before us.

When the bill was brought the city had no authoritative assessment against the orator of this property; and neither had attempted to levy, nor could have levied any tax upon such assessment; that majority has found the existence of a debarring equity against the orator, where one cannot be found,—that is, in an assessment which is inchoate and therefore unfit to receive a levy; and in a rate of taxes that the

Statement of Facts.

city adopted for, and that was adequate only to its assessment—but which this court applies to an assessment such as if it existed, would be inadequate to the rate—yielding less than the requisite revenue, a rate which, with its assessment, the propositions of this existing equity assumes to be void; so that to find the equity the court makes a rate for the city which the latter alone is competent to make for itself; and so, as the court is not a taxing power, its action herein is assumptive and arbitrary. The orator declares that it paid the \$363.40 upon taxes laid by the city on its assessment, therefore not upon any laid upon the territorial board assessment,—the defendants admit that such was the fact, and the court is bound by it, as the fact the payment then was made upon taxes that had no legal existence, was superfluous, and would have been if it had been a payment of the \$393.59,—was evidently done in an excess of caution, and the supposed equity does not exist. There would seem to be no room for error on the subject.

McNAMARA v. O'BRIEN.

PETITION IN ERROR: ADMINISTRATOR TO DETERMINE WHEN TO PROSECUTE.—Where an administrator refused to prosecute a petition in error, and the surety upon the supersedeas bond moved for leave to prosecute, *Held*, That the administrator had the right to determine whether the interests of the estate required that the prosecution be continued or abandoned, and that his refusal to appear and prosecute must be treated as conclusive evidence of his election not to prosecute.

IDEM.—In no event could the surety on the supersedeas bond be allowed to prosecute; that would be to allow him to control the prosecution, to interfere with the trust, and to deprive the administrator of the power to protect the estate.

ERROR to the District Court of Laramie County.

This was a motion by the surety upon a supersedeas bond, for leave to appear and prosecute the petition in error.

W. W. Corlett, for the motion.

C. N. Potter, contra.

PECK, J. Emily E. O'Brien obtained judgment in the district court against P. J. McNamara: the latter stayed it by a supersedeas bond; filed here his petition in error with a transcript for a review of the judgment; died; and N. J. O'Brien was appointed his administrator; qualified; and entered upon the trust; afterwards Emily E. O'Brien suggested the death of the intestate upon the record of this court; subsequently moved for a revivor of the case against the administrator; the motion was granted; the administrator was cited in, but failed to appear; and his default was entered. At this stage of the case R. B. Horrie, as surety upon the supersedeas bond, moved for leave to prosecute the petition in error, to which the defendant in error, after notice of the motion, does not object.

For the purposes of the motion I shall treat all the steps preliminary to making it, as having been duly taken. Its allowance depends, not on the assent of the defendant in error, but on the relation of the surety to the estate. To prosecute the petition would be to subject the estate to the risk of future costs, and to other expenses; it is the duty of the administrator to determine whether its interests require that the prosecution be continued or abandoned; to this determination he must apply sound discretion; failing to do so, he would subject himself and his administrative bond to liabilities for the consequences; his duty is an incident to his trust, is accompanied by a corresponding right in him to control the prosecution, and this right is purely representative; his refusal to appear and prosecute must be treated as conclusive evidence of his election not to prosecute; to allow the supersedeas surety to appear and prosecute the petition, would be to allow him to control the prosecution—to interfere with the trust—to deprive the administrator of the power to protect the estate. There-

Opinion of the Court—Sener, C. J.

fore the former must stand aside, abide the risk of the judgment, rendered below, remaining final or being affirmed, and in either event be confined for his protection to such defenses under the bond, as may exist outside of the issues which are covered by that judgment. The motion is denied.

Motion denied.

O'BRIEN v. CLARK, ADAMS, ET AL.

JUDGMENT.—The judgment of every court of competent jurisdiction is presumed to be correctly entered until the contrary affirmatively appears.

IDEM.—A party asking a review and reversal of a judgment, in the supreme court, must bring the record which he seeks to have inquired into; if he fails to do this, the judgment will be affirmed as being *prima facie* correct, without going into the merits.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion.

C. N. Potter, for plaintiff in error.

E. W. Mann, for defendant in error.

SENER, C. J. In this case, at the May term, 1880, of the district court for the first judicial district, in and for Laramie county, the defendants in error obtained a judgment against the plaintiff in error for \$214.44, with interest from June 17th, 1880, and \$41.78 costs.

The plaintiff in error caused a writ of error to issue out of the clerk's office of this court, and the case was docketed here without any transcript of the record, as required by law and the rules of this court.

At an early day of this court the defendants in error, by counsel, filed a motion supported by a copy of the judgment of the court below, duly certified under seal, and asked for a rule upon the plaintiff in error to show cause at another day of the term, why the judgment thus ordered and certified should not be affirmed. This rule was served upon the plaintiff in error, and upon the return day the plaintiff in error, as well as the defendants in error, were in court, and the plaintiff in error offered no objection to a judgment of affirmance, and did not pretend to bring into court or ask for time to bring into this forum, a copy of the proceedings which he alleged should be reviewed here. Under these circumstances we think the defendants in error entitled to an affirmance and a *procedendo*. The judgment of every court of competent jurisdiction imports that it was rendered correctly until the contrary shall affirmatively appear. He who comes here asking a review and reversal must bring the record which he seeks to have inquired into. His failure to do this, or his neglect to do it, after full opportunity given for that purpose, shows either that he himself concedes the correctness of the judgment below, or that the matter was brought here for delay, and in any event this court, under such circumstances, will affirm the judgment as being *prima facie* correct, without going into the merits, there being no transcript before us, and award a *procedendo* without requiring the defendants to do more than satisfy us of the rendering of the judgment below, by producing a certified copy thereof, which has been done in this case.

Let the judgment below be affirmed and *procedendo* issue.

Judgment affirmed.

PECK, J., dissenting.

The writ of error was issued, commanding the district judge to send up for review a full transcript of the record

Opinion of the Court—Peck, J., dissenting.

of the district court in the matter of its final judgment or order in this case, as filed there; and was returned by its clerk but without a transcript—and this for the want of due diligence on the part of the plaintiff in error. Subsequently, the defendants in error obtained here a rule against him to show cause why the judgment, alleged to have been rendered below, should not be affirmed; and against the sureties on the supersedeas bond, alleged to have been executed on the appeal in stay of the judgment, why judgment should not be rendered against them for the amount of the judgment below, with damages and costs. The rule is based upon a certified copy of the record of a judgment rendered in the case by that court, and a certified copy of the bond; both which copies were filed here. It is open to question whether the return of service, which is endorsed upon the rule, shows a sufficient service against the plaintiff in error; or a sufficient service against L. R. Bresnahan, on whom alone of the two sureties upon the bond, the return indicates that service was attempted. I shall, for the purposes of the motion, treat the service as sufficient in respect both to the plaintiff in error and to that surety. On the hearing there was no appearance by either of those parties. Nor does the return shew why service was not made upon the other surety; judgment is asked against Bresnahan, the same as if the service had been made upon both; for the same purpose I shall treat the motion as favorably as if service had been so made.

As to the motion for an affirmance. In an appellate court, a party is entitled to an affirmance by reason, not of the default of his adversary, but of the merits of the case, appearing in the record, sent up from below: for that purpose the transcript must affirmatively show all the material proceedings of the lower court in the case; therefore must not leave it in doubt whether it omits any of them. The present copy-record shows the following proceedings only; a suit in favor of the defendants-in-error against the plaintiff-in-error, pending in the first district court at its May

Opinion of the Court—Peck, J., dissenting.

term for 1880; that on a specified day of the term a motion for a new trial, made by the defendant below, was heard and denied; that he was allowed ten days for filing a bill of exceptions in the case; that the plaintiffs below then moved for judgment upon the verdict, which had been therein returned; and a money judgment for a specified sum was rendered for them accordingly. It is consistent with this fragment of the transcript that a bill of exceptions was duly settled and filed: a transcript should have been furnished, either setting it forth, or affirmatively shewing that there was none set forth, a necessity for reversal might appear; for the motion to affirm, in subjecting the case to a review upon the merits, compels a corresponding judgment. I dissent from the order of affirmance that has been entered upon this motion.

As to the motion for judgment against Bresnahan. He is concluded under the supersedeas bond by the final judgment against his principal, as to all the issues, covered by the judgment; but may defend against any attempt to enforce it upon the bond as to any matter of defense, which lies outside of the judgment; whether for fraud in obtaining his execution of the bond—for any discharge from it, which he may have received—for collusion between the parties to the judgment in procuring its rendition—or for other matter. He is therefore entitled to take issue as to his responsibility upon the bond; and to a jury trial upon such issue; such trial cannot be had in this court; nor can the proper issue or issues be framed here. I concur in the order of the court, denying this branch of the motion.

Argument for Plaintiff in Error.

McNAMARA v. O'BRIEN.

LANDLORD AND TENANT.—Under chapter 72 of the Compiled Laws of Wyoming the relation of landlord and tenant does not exist by implication, or operation of law, except a tenancy by sufferance.

ERROR.—Whenever error is apparent upon the face of the record, the rule is, that it is open to re-examination whether it be made to appear by bill of exceptions or in any other manner.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion.

W. W. Corlett, for plaintiff in error.

If it should be held, that the plaintiff could recover under her petition for the occupancy of the twelfth month, provided the defendant held over after the last month began; even then the evidence of N. J. O'Brien shows that the leasing was from April 5th, 1877, to April 5th, 1878, and that the keys of the storeroom were delivered on the 5th day of April, 1878, before twelve o'clock M. of that day; hence said defendant cannot be held liable for that month's rent, as charged in the petition, and the verdict was not sustained by sufficient evidence, and was contrary to the law governing the case, and hence the court below erred in overruling the motion for a new trial made by the defendant. See 2d Bouvier, page 7, sec. 19; Taylor's Landlord and Tenant, page 342, sec. 465; same, page 56, sec. 78; Angell on Limitations, page 41, sec. 50—latter part and note 3; Ohio Digest, vol. 1, page 535, sec. 6; Bishop on Contracts, secs. 702, 749; *et seq.* 752; Graham & Waterman on New Trials, vol. 3, pages 1179–81, 1192; Hilliard on New Trials, pages 336, 337, 338, 346, 353, 370; 12 N. H., page 171.

C. N. Potter, for defendant in error.

The only point made by the motion for new trial was

Opinion of the Court—Sener, C. J.

that the verdict was not supported by sufficient evidence and was contrary to law.

The verdict is in accord with the instructions of the court, which is the law for the jury, and to which no objection was made at the time, or since.

It was a question of fact fairly submitted to the jury, whether there was a lease for the second year. And also whether that contract had for its object and subject matter the renewal of the former lease, or was a new contract for the second year referring to the old one simply for the terms of the new.

If the jury took the former view, they should find for the defendant, if the latter, for the plaintiff.

It needs only the examination of plaintiff's authorities and a recurrence to the rule always held in this court to show that the verdict of a jury based upon conflicting evidence which fairly presents a question of fact, will not be disturbed by the court.

SENER, C. J. This is an action commenced in the district court of the first judicial district, in and for the county of Laramie, at the May term, 1878, having for its object the recovery of the sum of one hundred and twenty-five dollars, with interest, alleged to be due from the defendant in said action to the plaintiff therein, as rent for a store-room in the petition described, and for the rent thereof from the 5th day of March, 1878, to April 5th, 1878; said Emily E. O'Brien, as plaintiff in said action, averring in her petition filed in said cause, that the said one hundred and twenty-five dollars, with interest thereon, became due to her in accordance with a contract and lease theretofore entered into, in which plaintiff for a consideration of one hundred and twenty-five dollars per month, which said defendant undertook and promised to pay in advance monthly, leased said store-room to the defendant for the term of one year from the 5th of April, 1877. The defendant in said action, plaintiff in error here, by his answer denied all and singu-

lar the allegations in the petition of the plaintiff. At the May term, 1878, trial before a jury was had upon the issue joined, and upon the evidence produced, and upon the instructions given by the court; the jury returned a verdict assessing damages in favor of Emily E. O'Brien and against the defendant, in the sum of \$129.37. Plaintiff in error here, defendant below, filed his motion in proper time to set aside the verdict and grant a new trial, which motion was overruled by the court and judgment rendered for the sum of 129.37, and costs of suit, to which ruling and judgment of the court the defendant then and there excepted, and the case is brought into this court on the petition in error of the said defendant, in said suit, in said district court.

The facts of the case are these: As appears by the testimony of the parties, P. J. McNamara in March, 1876, leased from N. J. O'Brien, as the agent of Emily E. O'Brien, a certain store-room in Cheyenne. For the first year there was a lease in writing running from March 5th, 1876, to March 5th, 1877; the lease being made by McNamara on his own part, and by N. J. O'Brien, as agent for Emily E. O'Brien. Under that lease he held during that year. After the year was ended he continued to hold for eleven months, as N. J. O'Brien says, under a lease, but the lease was verbal. Both sides agree that it was never reduced to writing and signed: and there was no evidence before the court and jury that for the second year there was any lease in writing.

In our opinion the judgment of the court below will have to be reversed, for the reasons: that the judgment of the court is in direct conflict with chapter 72, Compiled Laws of Wyoming, page 436, and was unsustained in law. That chapter expressly declares: "That hereafter in this Territory there shall not exist the relations of landlord and tenant, by implication or operation of law, except a tenancy by sufferance; that upon the expiration of a term created by lease, either verbal or written, there shall be no implied renewal of the same for any period of time whatever, either

by the tenant holding over, or by the landlord accepting compensation or rent for, or during any period of such holding over; that such holding over by the tenant, and acceptance of rent by the landlord, shall constitute only a tenancy by sufferance, with the rights, duties, obligations and incidents of such tenancy; that no lease which shall have expired by its own limitation, shall be again renewed, except by an express contract in writing, signed by the parties thereto, whether the original lease be written or verbal. Nor shall any other tenancy than that by sufferance exist after the termination of the original lease, unless created as aforesaid, by express contract in writing." There is no question about the fact that McNamara vacated the premises on the 5th day of March, 1878, and did not occupy up to the 5th of April, 1878, the period for which the month's rent is claimed in the petition, claiming that it was under a lease. We think there was no holding beyond the 5th day of March, 1878. The premises were vacated, the keys were turned over to O'Brien. It is true she refused to receive them, but the premises were none the less vacated. It is true there is some evidence to show that the privy was used, and rubbish might have been left in the cellar; but there was no holding over or rental or occupancy in any legal sense after the 5th of March, 1878. Under these statutes which we have quoted in full, there could, at best, be only a tenancy by sufferance. Now a tenant by sufferance is one who holds by permission or indulgence, without any right. Such an one has a bare naked possession, and no estate that he can transmit; and so is liable to be evicted at the pleasure of his landlord: and *e converso* the tenant, of course, being in by mere permission, has the right to leave at any time he sees fit, and of course is liable not as a tenant by the year, or by the month, but only at best for the actual time that he may be in possession of the premises, in this case only the occupancy for one day, and liability for only one day's occupancy, and then not recoverable under an action on a lease,

but to recover at all it should be for an actual holding over or occupancy by a tenant by sufferance, and this would not be for more than the *pro rata* of more than one day to thirty at the rate of one hundred and twenty-five dollars per month; and this, in our judgment, could not be recovered in the form and under the issue that was presented to the jury. This action possibly might be amended for the purpose of a recovery as against a tenant by sufferance, but until such amendment, clearly no recovery can or ought to be had. To our mind upon the testimony as presented in the record, the court was utterly without jurisdiction or authority to enter judgment upon the verdict stated in the transcript, upon the evidence shown in the case. If it should be objected to this reversal, as it is done by our associate who dissents, that a reversal ought not to be had because there was no error of law occurring at the trial that was excepted to at the time as shown by the record, we answer in the language of Justice Clifford, in *Insurance Company v. Piaggio*, 16 Wallace, 378: "Wherever the error is apparent in the record, the rule is that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the foundation, proceedings, judgment, or execution of a suit, in a court of record." Here there was no foundation in law for the verdict. Indeed, we go further. It was not a mere error of law, but it was a verdict and judgment in spite of law, and in spite of evidence. Whenever that can be made apparent in this or any other appellate court, it ought never to hesitate about a reversal. We agree with the court in *Mitchell v. Anderson*, 1 Hill, 69, where it says, "the authority and duty of the court is very much misconstrued, if it be supposed that its sole function is a contest of dexterity between opposing counsel, and not to administer substantially the justice of the country." Surely we could not do this here if we allowed a verdict and judgment to stand without law or

Opinion of the Court—Peck, J., dissenting.

evidence to sustain it. For these reasons we think the judgment of the court below should be reversed, and the case remanded, with instructions to proceed in conformity with this opinion.

Judgment reversed.

PECK, J., dissenting.

Emily E. O'Brien obtained judgment in the district court against P. J. McNamara; the latter filed here his petition in error, with a transcript; died; and N. J. O'Brien was appointed his administrator; qualified and entered upon the trust; subsequently Emily E. O'Brien suggested the death of the intestate upon the record of this court; under her motion to revive the case against the administrator, he has been duly cited in—has failed to appear—and his default has been duly entered. She now moves for an affirmance. This leads us to consider the contents of the transcript. A verdict was rendered for the plaintiff below; the defendant moved for a new trial, upon the grounds only that the verdict was not sustained by sufficient evidence, and was contrary to law; the motion was overruled, exception taken, and judgment then rendered upon the verdict; no other exception was taken below, and this court is asked to reverse the judgment upon that one. Two questions are presented: one, as to the scope of the motion; one, as to whether it reaches any defect in the case.

As to the first inquiry. The motion is in terms based upon subdivision sixth of section 306 of the Civil Code, page 71 of the compilation,—which subdivision allows the motion, if the verdict is not sustained by sufficient evidence or is contrary to law; but as the last-mentioned ground and subdivision eighth of the section, which subdivision allows one for error of law occurring at the trial, and excepted to by the party making the application—re-

Opinion of the Court—Peck, J., dissenting.

late to the same subject matter and are therefore to be construed together; the motion is in effect based upon the two subdivisions.

A verdict rendered for a party for whom there is no evidence in the case, but which uncontradicted, establishes no fact or facts, on which a verdict can be based, and therefore proves nothing, is a verdict without evidence, unsustainable by evidence. A verdict rendered for a party for whom there is evidence in the case, and which, uncontradicted, furnishes a basis for the verdict, and therefore proved something,—but which, contradicted, does not justify the verdict, is a verdict with evidence,—sustained by evidence, but by insufficient evidence,—and has therefore been rendered against the weight of the evidence. This is the verdict intended by the sixth subdivision, as one that is not sustained by sufficient evidence. It constitutes common law ground for granting a new trial on motion; and the statute, so far as respects this branch of the subdivision, merely repeats that law. A verdict contrary to law is based upon an error of law; the error must either have occurred antecedently at the trial, or have originated in the verdict; if the former was the fact, the error should have been excepted to when committed; this is the common law rule, and is what the eighth subdivision necessarily imports, because it indicates no intention to deviate from that rule; if the latter was the fact, the exception should have been taken, either to the order directing the verdict to be recorded, and therefore when the order was made; or, by the bringing of the motion, treating that as an exception—in which way it is in this case unnecessary to determine.

As to the second inquiry. The petition alleged a lease to have been made between the parties, whereby the plaintiffs below let to the defendant below certain premises for one year from March 5, 1876, at a given monthly rent, payable in advance; that the rent for the month beginning on March 6, 1878, was in arrear and asked for a judgment accordingly: the general issue only was pleaded.

Upon the trial the plaintiff below introduced evidence, of which the tendency was that prior to March 6, 1876, she leased the same premises to the defendant for one year from the 5th of March, 1876, at the same rent, payable monthly in advance; and before the expiration of that year verbally relet the premises to him for one year from the 5th of March, 1877, at the same monthly rent, payable in advance; and offered no evidence of any other lease as having been made by her to the defendant, than the two, which are last above stated; and that on the 5th of March, 1878, he tendered a partial surrender of the premises; here the plaintiff rested in her opening: thereupon the defendant in answer, introduced testimony, which agreed with the plaintiff's, as to the first letting; also as to the reletting, except as to the length of time for which the premises were relet; which also agreed with the plaintiff's evidence as to the surrender being partial, and how partial, and when made. The plaintiff rebutted, and no other evidence was introduced than what I have described. The defendant claimed that the tender vacated the premises, terminating the lease, and exonerating him from further rent; and made no claim to having terminated the lease otherwise. Under section 2d of the statute of December 1, 1875, entitled "An act concerning the relations of landlord and tenant," page 436 of the Compilation,—the second lease if in terms a renewal of or a new contract dissimilar to the original lease, created only a tenancy by sufferance; and the tender, because partial, was abortive. The court instructed the jury to find first, whether the second lease was a renewal of the first, or a new and independent one; secondly, if a renewal, whether the defendant had vacated the premises on the 5th of March, 1878; and if he had not, to render a verdict for the plaintiff for the rent claimed in the petition; if he had, to render one for him. The verdict was rendered for the plaintiff, and is the one which is in question. It was consistent with the evidence, for the testimony on both sides agreed that the second contract was verbal,

therefore in effect a tenancy by sufferance; and it agreed that the tender was only a partial surrender. The verdict was, therefore, strictly obedient to the charge. (The charge as to a new and independent contract, meaning a new and dissimilar one, founded upon a misconception of the law unduly favored the defendant, did not mislead the jury,—if it did, they found against this part of it, so that it was harmless.) Moreover, the issue which was raised upon the evidence, and the only one tried, was, as will be subsequently explained, substantially different from that which was presented by the pleadings. If the court could have tried the former, it was its duty to have ordered for the plaintiff below, the verdict that was rendered; because, where the verdict can upon the evidence be but one way and one thing, it stands determined upon the completion of evidence, and the court may not submit it to the determination of the jury, but must order it. Therefore in no aspect is this verdict unsustained by sufficient evidence.

The verdict is contrary to law: but by reason of an error of law, not originating in it, but occurring antecedently to it upon the trial. The contract which is alleged in extenuation, is special, because its terms are special and could exist only by a special contract. The contract, which appears in the proofs, is a tenancy by sufferance, arises by implication, and is no more than what would arise. The two are substantially different; call for correspondingly different proofs; and the latter could not have been introduced upon the record by amendment. Hence by her opening evidence the plaintiff below abandoned the contract that was in issue, and proceeded upon one that neither was, nor properly could be in issue. Consequently, when she rested in her opening, the defendant had a right on motion to a non-suit or a verdict; he omitted to claim either; and the evidence proceeded as I have explained; but at the close of the testimony and before the charge he might still have moved either for a non-suit, or a verdict: this he omitted to do; yet at the close of the charge he might have excepted

to the charge as given and have made either motion: and this he omitted to do: either application would have been based upon the fact, that there was no evidence in the case tending to sustain the petition: and upon the principle, that in the absence of such evidence the issue, which had been tried, was false; and there was nothing to leave to the determination of the jury; and that to submit the case to its determination would be error. An exception to a ruling against the motion would have completely protected him against the verdict, because it would have laid the foundation for a review either by a motion for a new trial or by a writ of error.

The motion reached no defect in the case, and the judgment should be affirmed.

CASES
ARGUED AND DETERMINED
IN THE SUPREME COURT
OF THE
TERRITORY OF WYOMING.

MARCH TERM, 1882.

WOODS *v.* THE HILLIARD FLUME AND LUMBER COMPANY.

BILL OF EXCEPTIONS.—The plaintiff in error must present his bill of exceptions to the court for allowance, not to a judge out of court, and on a day not beyond the first day of the next succeeding term.

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

H. Garbanati, for plaintiff in error.

W. W. Corlett, for defendant in error.

SENER, C. J. This case comes here on a writ of error from the district court of Uinta county. The facts as they appear in the record are these: Mosher, the assignee of Woods, moved the court below to amerce the sheriff, Pepper, in a judgment for \$408.25, for neglecting and refusing to pay over money on an execution together with twenty per cent. thereon as damages and the costs.

The case on the motion was tried by the court on the 16th of July, 1879, and judgment rendered in favor of the plaintiff for \$69.70; waiving the twenty per cent. as the

Opinion of the Court—Sener, C. J.

order expresses it. The plaintiff was dissatisfied with this order, and moved for a new trial, or as he expresses it, for a rehearing of the motion. This the court refused on the 18th of July, 1879; the plaintiff excepted and leave was given him until the first day of the next term to file his bill of exceptions.

The case was heard by this court at its 1881 term on the defendant's motion to dismiss the proceedings in error, which the plaintiff in error resisted. The defendant in error assigned eight grounds for dismissal, but as one of them will dispose of the motion we do not care to refer to any others.

That assignment is in these words, "because there is no valid bill of exceptions in the record herein allowed and signed as required by law, showing any exceptions taken by the plaintiff in error in the court below."

The permission given the plaintiff in error was to file his bill of exceptions by the first day of the next term of the court, as shown by the record. This was exactly the permission that might have been granted, and the full extent of it, under sections 300 and 303 of the Compiled Laws of Wyoming, chap. 13, page 71. Then it will be seen that the bill of exceptions must be presented to the court for allowance, not to a judge out of court, and to a day not beyond the first day of the next term of the court. The first day of the next term of the district court for Uinta county, for January term, 1880, was as fixed by law, of which this court takes judicial cognizance, on the 5th of January, A. D. 1880: but the record does not pretend that the alleged bill of exceptions in this case was ever presented on the first day of said term, or any day of said term, or that it was ever presented in said county of Uinta.

The certificate of the Hon. J. B. Blair, as shown in the record, is, that it was presented to me as judge, not to the court, on the 30th day of March; where it does not appear, and for all the record shows it does not even appear that it was presented in Wyoming Territory, nor does the judge

Opinion of the Court—Sener, C. J.

certify it to be a true bill of exceptions. These facts being indisputable on the face of the record, the defendant's motion to dismiss the writ of error herein we hold to be well taken, and it is accordingly ordered that it be dismissed, and that all further proceedings in this court be discontinued and be at an end; and that this fact be certified by the clerk of this court to the district court of Uinta county, with directions to the clerk of that court that the judgment which said court rendered at its July term, 1879, has become final by the action of this court herein.

Ordered accordingly.

HOY v. SMITH.

NON-SUIT.—It is error for the court to grant a non-suit upon the defendant's motion, and against the will of the plaintiff, his objection being made at the time and an exception duly taken.

IDEM.—If the law was against the plaintiff, the court might of its own motion, or upon the request of the defendant, have instructed the jury to find for the defendant, and if the court so held, or believed, it would have been its duty to so instruct.

(Reaffirming, *Mulhern v. The Union Pacific Railway Company.*)

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

H. Garbanati, for plaintiff in error.

W. W. Corlett, for defendant in error.

SENER, C. J. This was an action commenced in the justice's court by the plaintiff in error against the defendant in error; defendant took a change of venue to another justice, and on trial by a jury, plaintiff obtained a verdict for the amount claimed. Defendant then appealed to the dis-

strict court, where a trial of the case was begun by a jury. The action was for the recovery of the amount paid for a trunk, which the agent of the defendant warranted as "sole leather," but which turned out to be pasteboard, covered with a thin coating of leather, with springs to support the top, and give the elasticity of sole leather, but trimmed and finished in a stylish manner and covered with canvas, as the plaintiff in error claims.

After the plaintiff had closed his case, the defendant's counsel moved for a non-suit, which was granted, on the ground that "no man can be guilty of a *tort* by his agent." To the granting of which motion plaintiff excepted.

As we have shown in the case of *Mulhern v. The U. P. R. R.*, this day: a non-suit was grantable at common law for certain reasons therein stated, and is also allowable for certain reasons and on certain grounds stated in the Wyoming code. But this case is covered by none of them; or rather the action of the judge who tried this case in the court below, is not authorized either by the common law or the Wyoming code, in granting a non-suit on the defendant's motion, and against the will of the plaintiff, his objection being made at the time and an exception duly taken. We will not go behind this action of the judge to decide whether the pleadings were sufficient or insufficient. If they were insufficient, *i. e.* if the law was against the plaintiff, the court of its motion, or upon the request of the defendant below, might have instructed the jury to find for the defendant, and if the court so held or believed, it would have been its duty so to have instructed; upon its granting or refusing such instruction, and proper exception taken at the time, a case could have been made up and brought here which it would be our duty to decide. But a trial by jury was begun in the lower court, *i. e.*, the district court in and for Uinta county, and the judge then presiding, the then Chief Justice Fisher, erroneously took the case from the jury and so prevented a trial. We will not try it for the first time here, nor will we pass upon the suffi-

Opinion of the Court—Sener, C. J.

ciency of the pleadings at this time. It will be observed that the case was brought in the justice's court, where great latitude always properly is allowed, and though tried *de novo* in the district court, where the parties had a right to amend or substitute new pleadings, under section 66, chapter 71, Compiled Laws of Wyoming, page 408, none such were substituted, nor did the parties of their own motion amend, nor were they required to do so.

The assignment of error, that the court below erred in taking the case from the jury by a *non-suit* against the plaintiff's will and over his objection and exception duly taken and presented at the time, and upon a writ of error here duly prosecuted, is sustained. It was not necessary, we think, to move for a new trial, which the plaintiff in error did out of abundant caution. There was no trial; the meaning of a *non-suit* is that the plaintiff does not proceed to a trial. A jury having been impaneled, the plaintiff was entitled to a verdict, and of this he could only be deprived by his consent; here it was entered against his consent; he excepted, his exception then, as we have said, was well taken, and his assignment of errors sustained. Wherefore the judgment entered in the court below, at the July term, 1878, must be annulled and set aside, and this case remanded to said court for a trial to be had therein in conformity with this opinion; the plaintiff in error to have his costs in both courts.

Ordered accordingly.

Argument for Plaintiff in Error.

MOSHER v. THE BOARD OF COUNTY COMMISSIONERS OF
UINTA COUNTY.

JUDGMENT.—Section 394, of the Civil Code, provides that "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." Where the record shows what purports to be a judgment for costs only, but in which the amount of such costs is left blank, the judgment not being exact as to the costs, will be reversed, and the case remanded for a new trial.

ERROR to the District Court of Uinta County.

The facts are stated in the opinion.

W. W. Corlett, for plaintiff in error.

The court erred in undertaking to render a final judgment on the merits upon the defendant's motion for a dismissal. Freeman on Judgments, secs. 261, 262; *Homer v. Brown*, 16 How., 364; *Bridge v. Sumner*, 1 Pick., 371; *Morgan v. Bliss*, 2 Mass., 113; *Derby v. Jacques*, 1 Clifford, 425; *Knox v. Waldoborough*, 5 Me., 185; *Howes v. Austin*, 35 Ills., 396; *Hollard v. Hatch*, 15 Ohio, sec. 464.

The plaintiff has a right to take non-suit or dismissal without prejudice at any time before verdict. Common Laws of Wyo., page 82, secs. 379, 380; *Graham v. Tate*, 77 N. C., 120, *Ibid*, 126; *Harris v. Beam*, 46 Iowa, 118; *Dunning v. Galloway*, 47 Ind., 182.

"The submission of a cause for trial by the court without the intervention of a jury, does not deprive the plaintiff of his right to a non-suit, and care should be taken to so conduct the trial as to afford him the same opportunity of exercising that right as if a jury had been sworn." *Hall v. Schuchard*, 37 Md., 15; Common Laws of Wyo., page 82, secs. 379, 380.

The judgment in this case, or what purports to be the

Opinion of the Court—Sener, C. J.

judgment, is wholly insufficient because it is merely a finding by the court, and really no judgment at all, and for the further reason that no amount is expressed as the sum to be recovered. Freeman on Judgments, sec. 49; *Lind v. Adams*, 10 Iowa, 398; Freeman on Judgments, 50, 51 and 52; Common Laws of Wyo., page 70, secs. 279, 280.

H. Garbanati, for defendant in error.

A judgment to be good must be capable of enforcement. The purported judgment in this case being for costs, without specifying the amount, is not capable of being enforced, and therefore is not a subject for revision, reversal or affirmance. Freeman on Judgments, sec. 46; *Whitaker v. Branson*, 2 Paine's C. C. Reports, 209; *Holt v. Wood*, 23 Texas, 474; *Martin v. Wade*, 22 Texas, 224; *Tompkins v. Hyatt*, 19 N. Y., 534.

SENER, C. J. This case comes here on a writ of error from Uinta county, and was heard by the court at its last term on the motion of the defendant in error to dismiss, and upon the merits.

The facts are these: In 1876 the plaintiff in error paid the defendant in error \$279.31 as a tax on railroad ties which he supposed he owned, and which the defendants in error claimed that he did own and should pay a tax on, and this was really the issue below; but which the plaintiff in error claims really belonged to other parties, and this the defendants in error put in issue by their general denial below, the case coming to the district court of Uinta county on an appeal from the board of county commissioners of that county, where new pleadings were filed. The case was tried by the court, and the final judgment rendered, and from which the plaintiff in error seeks to be relieved is as follows:

"The court having heard all the evidence offered, is of opinion that the conclusions of law are with the defendant. The court therefore finds for the defendants, and that

Opinion of the Court—Sener, C. J.

the defendants recover their costs taxed at \$ from and of the plaintiff."

There are several errors assigned, and the motion to dismiss, and the disposal of the case on its merits will be treated together.

Both parties claim in their briefs, that the judgment does not satisfy the Wyoming statutes; the defendants in error strangely claiming that it is not sufficient to support proceedings in error, and yet that it should stand below as a final determination between the parties, for such would be the result of granting their motion to dismiss the proceedings in error.

If it is a judgment for any purpose, in our opinion it must be so for all purposes. That it cannot be a judgment for any purpose it is only necessary, in our opinion, to quote the Compiled Laws of Wyoming, page 84, sec. 394, which declares in these words, "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted, or order made in the action." And again on page 88 of the Compiled Laws 1876, sec. 429, the last clause in describing for what an execution may issue says, "the exact amount of the debt, damages and costs for which the judgment is entered shall be endorsed on the execution." Surely words less capable of being misunderstood could not be used. There is no debt nor damages in this case; there are costs adjudged which are left blank. If the judgment was final and unappealed, and the omission one that was merely clerical, possibly a motion with notice to the adverse party under another section of the laws might lie for its correction and to make it exact as to costs, but here we are to deal with the record as we find it, and doing this we find a judgment for costs in blank; and so not only are the costs not exact, but there are no costs; and so we conclude that this purported judgment, not being exact as to the costs, and this case remanded to the district court for Uinta county for a new trial to be had therein, the plaintiff in error to have his costs in both courts.

Judgment reversed.

Argument for Plaintiff in Error.

MULHERN v. THE UNION PACIFIC RAILROAD COMPANY.

NON-SUIT.—A non-suit is not a judgment nor the final determination of a cause, and under section 379 of the Civil Code a district court of this Territory has no authority to order a peremptory non-suit against the will of the plaintiff.

MOTION FOR NEW TRIAL.—A motion for a new trial in the district court was unnecessary, for the reason that the trial by jury, which was inaugurated, was never had.

ERROR to the District Court of Albany County.

The facts are stated in the opinion.

M. C. Brown, for plaintiff in error.

A judgment of non-suit is a judgment dismissing the action. The Code of Civil Procedure provides under what circumstances a case at law may be dismissed, and further provides that in "all other cases, upon a trial of the action, the decision must be upon the merits." This case was not one of those that can be dismissed by the court. Civil Code, sec. 379; *Byrd v. Blessing*, 11 Ohio St., 362; 1 Pet., 471, 497; *Ellis & Norton v. Ohio Life Insurance and Trust Co.*, 4 Ohio St., 648; *Langhoff v. Pr. Duchein R. W. Co. et al.*, 19 Wis., 515; *Strucke v. The M. & M. R. R. Co.*, 9 Wis., 183; 4 Ohio St., 648.

Negligence is not a fact, but a conclusion of facts. It cannot be testified to as a fact, but is inferred from all the circumstances of the case. 19 Wis., 518; *Thompson's Neg.*, vol. 2, p. 1011; *Stoddard v. St. Louis R. R. Co.*, 65 Mo., 514, 521; 61 Mo., 591; 62 Mo., 230; *Martin v. Simpson*, 6 Allen, 102; 106 Mass., 149; 36 N. Y., 153; 41 Cal., 109; 23 Connecticut, 339; and 9 Wis., 183; 10 American R., 428, 9; *Homes v. Clark*, 10 W. R., 405; *Huddleston v. Lowell Machine Shop*, 106 Mass., 282; *Briton G. W. Cotton Co.*, Law Rep., 7; Exch., 130.

Argument for Plaintiff in Error.

The motion for non-suit is based chiefly upon the proposition of contributory negligence of plaintiff, or knowledge by plaintiff of carelessness of fellow-servant.

These are matters of defense. See Abbott's Trial Evidence, 595 and 596; *Railroad Company v. Gladman*, 15 Wall., 401; *Indianapolis R. R. Co. v. Holst*, 3 Otto, 291; *Haley v. Earle*, 30 N. Y., 208; *Button v. Hud. Riv. R. R. Co.*, 18 N. Y., 248; *Johnson v. Hud. Riv. R. R. Co.*, 20 N. Y., 65; 43 N. Y., 82; *Greenleaf v. Ill. Cen. R. R. Co.*, 29 Iowa, 14; same case, 4 American, 181; Wharton on Negligence, sec. 425; *Gay v. Winter*, 34 Cal., 153; *Smoot v. Mayor*, 24 Alabama, 112; *P. & M. R. R. Co. v. Hoechl*, 12 Bush (Kentucky), 41; 31 Md., 357; *Hocum v. Witherick*, 22 Min., 152; *Thompson v. North Mo. R. R.*, 51 Mo., 190; *White v. Concord R. R. Co.*, 30 N. H., 188-207; *Durant v. Palmer*, 29 N. J., 244; *Cleveland & C. R. R. Co. v. Crawford*, 24 Ohio State, 631; *Pennsylvania R. R. Co. v. Weber*, 76 Penn., S. C.; 18 American, 407; *Hoyt v. Hudson*, 41 Wisconsin, 105, S. C.; 22 American, 714; 63 N. Y., 643; 18 American, 407; *Lanning v. New York Cen. R. R. Co.*, 10 Am. R., 417; Id. 327; 18 American R., 412; 4 Amer. R., 353; *McIntire v. New York Central*, 37 N. Y., 287; 18 Amer., 412; Id., 407; 22 Amer. R., 715; Thompson on Negligence, page 1000, particularly 1011.

Knowledge of defect in machinery or carelessness of fellow-servant is no answer in law to negligence on part of defendant. See authorities before cited, particularly *Lanning v. New York Central*; 10 Am. R., 417; 11 Amer., 715; 18 American, 407; and Id., 412; *Frost v. Inhab. of Waltham*, 12 Allen, 85; S. and R. Negligence, sec. 414; *Reed v. Northfield*, 13 Pick., 94.

This being true, and this matter of defense, it necessarily follows it was error to sustain the motion for non-suit on this ground. See authorities before cited.

Notice of carelessness of servant to one who has authority to hire and discharge servants, is notice to the principal. See *Lanning v. New York Central*, 10 Am. R., 417, and

Argument for Plaintiff in Error.

cases there cited; 76 Penn. State, 389, S. C.; 18 Am. R., 412; *Conger v. Chicago & C. R. R.*, 24 Wis., 157; *Parker v. Steamboat Co.*, 109 Mass., 449.

Proof of specific acts of carelessness is sufficient proof of habitual carelessness of servant. *Baulec, Admr. v. New York & Harlem R. R. Co.*, 17 Amr. R., 325 (59 New York, 356); Am. R., 111 (38 Ind., 294); Wharton's Ev., vol. 1, sec. 41; Abbott's Trial Evidence, p. 593.

If the evidence tends to make a *prima facie* case for the plaintiff, a non-suit cannot be properly ordered. 19 Ohio, 442; 11 Ohio St., 632; 11 Ohio, 454; *Harris v. Frank*, 49 N. Y., 24.

Plaintiff under our statutes stands as a stranger to the defendant, and defendant's liability is measured by a wholly different rule. See Compiled Laws of Wyoming, page 512, chapter 97; 3 Ohio State, 210; 20 Ohio, 415; Thompson on Negligence, 1000 *et seq.*, 953, 970, 984; 1 Redfield on Law of Railways, 527.

On construction of a statute like ours see Thompson on Negligence, vol. 2, page 979, *et seq.*; rules of construction, see Bishop's Stat. Crimes, sections 78, 79, 80, 81, 82, 89, *et seq.*, and Dwar. Stat., 2d ed., 568.

Under a statute like ours the least that can be said of it is, that it so far changes the relations of master and servant that the master is held to about the same degree of care as to a person (a stranger) on the track of the defendant by permission.

As to liability under such circumstances see Thompson on Negligence, page 461, and cases there cited; Cooley on Torts, pp. 664 and 665; Addison on Torts, vol. 1, sec. 547, pp. 579, 580, 581, 582 and 583, and notes on said several pages.

The question is properly raised for review on the record by the exception taken, as shown by the bill of exceptions brought into this court. See *Cravens v. Dewey*, 13 California, 42; *Pratt v. Hull*, 13 Johns, 335; *Ellis & Morton v. Ohio Life and Trust Co.*, 4 O. S., 628; 11 O. S., 362; 11

Argument for Defendant in Error.

Ohio, 452; 19 Ohio, 426 and 442; *Powell v. Power*, 14 Ohio, 54; *Harrison v. Juneau Bank*, 17 Wis., 359; *Imhoff v. Chicago and Milwaukee R. R. Co.*, 22 Wis., 649; *Sulton v. Town Wawatosa*, 29 Wis., 21; *Hunter v. Warner*, 1 Wisconsin, 128.

W. W. Corlett, for defendant in error.

That the plaintiff in the court had full knowledge of the matters of which he now complains—that he remained in the defendant's service after having such knowledge—that he was not induced to remain in defendant's service by any promise that any change would be made—or upon any inducement or hope whatever held out to him that would justify him in believing that the risk of the service was not waived by him if he remained, are propositions that are indisputably established by the evidence. He therefore had no cause of action. *Shearman and Redfield on Negligence*, secs. 94 and 96; *Greenleaf v. I. C. R. R. Co.*, 29 Iowa, 14; *Davis v. R. R. Co.*, 20 Mich., 105; *Dillon v. U. P. R. R. Co.*, 3 Dillon, 319; *R. R. Co. v. Barber*, 5 Ohio St., 564; *Hayden v. Smithville Manufacturing Co.*, 29 Conn., 548; *Buzzell v. Laconia Manufacturing Co.*, 48 Me., 113; *Frazier v. R. R. Co.*, 38 Pa. St., 104–111; *Ladd v. R. R. Co.*, 119 Mass., 412; S. C., 20 Am. R., 331; *Priestly v. Fowler*, 3 M. & W., 1; *Coombs v. New Bedford Cordage Co.*, 102 Mass., 572; *Gibson v. Erie R. W. Co.*, 63 N. Y., 449; S. C., 20 Am. R., 552; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y., 612.

Being guilty of contributory negligence he could not recover, whatever the other facts of the case may be. *Lovejoy v. R. R. Co.*, 125 Mass., 79, S. C., 28, Am. R., 206; *Lanning v. R. R. Co.*, 49 N. Y., 521; *Thompson on Negligence*, 932; *Shearman and Redfield on Negligence*, sec. 25.

A stranger's right of action in the case would depend entirely upon the fact whether or not the engineer, after discovering him on the track, unnecessarily and without warning to him, ran over him. But there is no evidence

Opinion of the Court—Sener, C. J.

whatever that the engineer ever saw him on the track before the accident by which he was injured. Hence, in any view of the case, the plaintiff shows that he has no cause of action. *Finlayon v. R. R. Co.*, 1 Dillon, C. C. R., 579; *R. R. Co. v. Collins*, 87 Pa. St., 405; *S. C.*, 30 Am. R., 371.

The petition and proof in this case show, beyond all question, that the matters of default or negligence, alleged against the defendant—both as to the pony engine and the engineer, Charles Brown, were well known to the plaintiff. The plaintiff therefore assumed, as a matter of law, the risks incidental to such a hazardous service as he shows he was engaged in at the time of his injury, and his case is clearly not made out either as to his allegations or his proof in not alleging, and showing by proof, that although the said defaults on the part of the railroad company existed, yet that he either had no knowledge of them, or that, if he did, that his case is within some of the exceptions which allow him to recover, notwithstanding such knowledge. *Thompson on Negligence*, pp. 1050–2; *The Mad River and Lake Erie R. R. Co. v. Barber*, 5 Ohio S., 541; *Shearman and Redfield on Negligence*, sec. 94; *Bussell v. Laconia Manufacturing Co.*, 48 Maine, 113; *Thompson on Negligence*, pp. 1008–9; *Wright v. N. Y. C. R. R. Co.*, 25 N. Y., 562.

SENER, C. J. Francis Mulhern, plaintiff in error, on the 13th of August, 1880, filed an amended petition in the second district court for Albany county, claiming damages for injuries received whilst acting as night yard master at Laramie City, in the sum of \$50,000, because of the recklessness and carelessness of one of the defendant's servants, one of its engineers; the plaintiff alleging that at the time the injuries were received he was in the discharge of his duties, and that he was so cut, bruised and wounded as to be disabled from engaging in any pursuit or earning a living for the remainder of his life. The defendant de-

murred, which was overruled, and then plead the general denial. An issue thus being made, a trial was begun, and the plaintiff had offered his testimony in support of the issue and rested, when the defendant moved for a *non-suit* on the following grounds:

First. Because the evidence does not warrant any verdict or finding against the said defendant.

Second. Because there is no legal or competent evidence in the case to establish the allegation in the amended petition in respect to the incompetency and carelessness of the engineer, Charles Brown, the fellow-servant of said plaintiff, through whose alleged incompetency, carelessness and negligence it is alleged said plaintiff was injured.

Third. Because there is no evidence in the case sufficient to establish *prima facie* the allegation, in said amended petition, respecting the knowledge of said defendant as to the alleged defect in the pony engine, and the alleged incompetency, carelessness and negligence of the said Charles Brown.

Fourth. Because it appears from the evidence that the said plaintiff was, long before the time he was injured, fully aware of the defect in the pony engine of which he complains, and of the alleged incompetency, carelessness and negligence of the engineer, Charles Brown, of which he complains, and therefore assumed the risk of working with said engine and with the said Brown, and because there is no evidence in said case showing that the defendant ever promised the said plaintiff to repair said engine, or discharge or remove said Brown, or that the plaintiff would be relieved from the necessity of working with said Brown.

Fifth. Because any finding or verdict for the plaintiff in this case, on his evidence, would not be warranted in law.

Sixth. Because the evidence fails to show that the defendant failed to use ordinary and due care in any respect wherein it owed any duty to the said plaintiff. That said motion for non-suit was sustained by the court, and the cause dismissed. Plaintiff excepted. Bill of excep-

Opinion of the Court—Sener, C. J.

tions was duly signed and approved by the court, and made a part of the record.

The case comes into this court by writ of error, and the only error assigned is that the court erred in sustaining the motion for a non-suit, and so withdrawing the case from the jury, which was sworn to try the case, and in dismissing the action against the consent of the plaintiff, and over his objection and exception taken at the time.

A non-suit at the common law could only be entered in three cases:

First. If the plaintiff neglected to deliver a declaration for two terms after the defendant appeared, or was guilty of other delays or defaults against the rules of law in any subsequent stages of the action, he was adjudged *not to follow*, or pursue his remedy as he ought to do, and thereupon a *non-suit* or *non-prosequitur* was entered, and he was said to be *non-pros'd*. *Vide* Cooley's Blackstone, book 3, sec. 296.

Second. When in the course of pleading either party neglected to put in his declaration, plea, replication, rejoinder and the like, within the time allotted by the standing rules of the court, the plaintiff, if the omission be his, was said to be *non-suit*. *Vide* Cooley's Blackstone, book 3, sec. 316.

Third. In cases where a jury had been sworn. In such a case it was usual for the plaintiff, when he or his counsel perceived that he had not given evidence sufficient to maintain his issue, to be voluntarily non-suited or withdraw himself, whereupon the crier was ordered to call the plaintiff, and if neither he nor anybody for him appeared, he was non-suited, the jurors discharged, the action was at an end and the defendant recovered his costs * * * * * but if the plaintiff appeared, the jury by their foreman delivered in their verdict,—*vide* Cooley, Book 3, sec. 376. Surely it will not be claimed that a non-suit was entered in any contingency provided for under the three foregoing headings. And so it was not entered in pursuance of any authority at common law.

Opinion of the Court—Sener, C. J.

The Code of Civil Procedure, Compiled Laws of Wyoming, chap. 13, title xi, sec. 379, follows the common law with great exactness, and goes possibly a little further. It provides as follows:

“An action may be dismissed without prejudice to a future action:

First. By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court.

Second. By the court, where the plaintiff fails to appear on the trial.

Third. By the court, for want of necessary parties.

Fourth. By the court on application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

Fifth. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases upon the trial of the action, the decision must be upon the merits.”

It will not be claimed that there was any decision upon the merits, and as one will readily see at a glance, the non-suit entered was not allowed as provided for in any of the subdivisions quoted.

What is a decision upon the merits? It is a decision upon the justice of the cause, and not upon technical grounds only (*vide* Bouvier's Dictionary, under heading of Merits,) the real or substantial grounds of the action in distinction from technical or collateral matter, *vide* Abbott's Dictionary (Merits.) The N. Y. Code defines merits to be the strict legal rights of the parties as distinguished from mere questions of practice. Now in every case where a non-suit is unprovided for, there must be upon the trial, a decision upon the merits. Now let us ascertain the meaning of the word “decision;” Bouvier's Dictionary says it is a judgment given by a competent tribunal. Abbott says it is the result of the deliberations of a tribunal, the judicial determination of a question or cause. By sec. 377 of our

Opinion of the Court—Sener, C. J.

code, a judgment is the final determination of the rights of parties in action. Surely a non-suit is not a decision. It is no judgment in the sense of our code, nor is it the judicial determination of a question or cause, for after the entry of a non-suit, a new suit may be brought. In this case there was no decision by the jury, no final determination, and so no final judgment could be entered.

If the case has no merit, either in law or upon the evidence, let the court by an instruction, either of its own motion or upon request, say so to the jury. If the case has merit and a jury is called, they are to decide it upon its merits, under such instructions as may be given by the court. The statute says, "In all other cases upon the trial of the action, the decision must be upon the merits." The trial under the Wyoming Code is defined as follows: When a jury is impaneled it includes a verdict, *vide* chap. 13, title xi, sec. 260. The same was true at common law. Once begun before a jury a trial must end in a verdict, unless the plaintiff voluntarily becomes non-suited in one of the three ways heretofore pointed out. A non-suit does not decide the case upon the merits. Under neither of the subdivisions heretofore quoted, can the non-suit entered in this case be justified or sustained. So it is unsustained at common law, and unsustained and unauthorized by our statute. The counsel for the defendant in error claimed as authority, the action of the supreme court of this Territory in the case of *North et al. v. McDonald et al.*, reported in 1 Wyo. Reps., p. 348. An inspection of that case however, so far as we can gather the facts from the statement of Thomas, Judge, shows that after the testimony of the plaintiff closed, the defendant moved for a non-suit, which after argument was granted; but the facts do not disclose that any objection was made at the time, and so practically the plaintiff, not excepting, became bound to some extent by what occurred at that time. Afterwards, it is true, there was a motion to set aside such non-suit, which was overruled. This was right.

After the plaintiff had in fact stood by and seen his case

Opinion of the Court—Sener, C. J.

go out of court, and without exception or objection, it was too late for him, as a matter of right to ask leave to reinstate the case. If he felt that he still had a good case, and the evidence to sustain it, his opportunity was by bringing another suit if not barred by the statute of limitations. But the counsel for the defendant in error laid stress on the fact, that the supreme court of the United States affirmed the supreme court of this Territory. This is true, though the case was unreported in either Otto 10 or 11, the vols. which report the cases for the term of 1879 in the supreme court of the United States.

That the decision might be obtained for our guidance and instruction, a copy was applied for to the clerk of the supreme court of the United States, who furnished it and it is here inserted entire.

“No. 41.—OCTOBER TERM, 1879.

Orlando North and L. Newman, assignees, &c., Plaintiffs in Error v. William McDonald and Harvey Booth.

In error to the supreme court of the Territory of Wyoming.

Mr. Chief Justice Waite delivered the opinion of the Court.

The plaintiff below evidently intended to bring this action under sec. 5129 of the Revised Statutes; but the averments in their petition are only sufficient to make a case under sec. 5046. While the court would certainly have been justified in leaving the question of fraud to the jury upon the evidence as it stood, we think, if a judgment had been rendered against the defendants, it might with propriety have been set aside as being contrary to what had been proven. For this reason, although it might have been more in accordance with correct practice not to take the case from the jury, we will not disturb the judgment. No request was made for leave to amend the petition, and we

must consider the case here as made by the pleadings, and not as the parties may have intended to make it.

The judgment is affirmed.

The supreme court of the United States say the correct practice would have been to have left the case to the jury, and not to have taken it from them: but they go beyond this, and evidently hold that the law of the case was insufficient to warrant a verdict, that the plaintiff in error failed to ask leave to amend the pleadings to make a proper case, and so they affirmed the court below. Here it is different: the records show the interposition of a demurrer, and that it was overruled, so *prima facie* there was law to warrant the verdict of the jury, and the motion for a *non-suit* is based entirely on the sufficiency of evidence in all of its six grounds, a question in a jury trial purely for the jury to determine. If there be no evidence whatever for the jury to base a verdict on in favor of the plaintiff, let that be determined by the rules of law too well established to need more than their statement.

I. The defendant can demur to the evidence and that puts the case in shape for a judgment in the court below and so ends the controversy. This withdraws the case from the jury, and the court can decide it upon the sufficiency of the evidence as introduced to maintain the issue.

II. If the defendant believes there is no evidence upon which to find or authorize a verdict against him, he can move the court so to instruct the jury and to find for the defense, and if there be no evidence to support a verdict it will be the duty of the court in such case so to instruct, but if there be any evidence, though slight, to authorize a verdict for the plaintiff it is error in the court to so instruct; but the finding under such circumstances should be left to the jury. *Vide Schuchardt v. Allen*, 1 Wallace, 369. In this case the court say, "A circuit court has no authority to order peremptory non-suit against the will of the plaintiff."

Citing the cases of *Elmore v. Grymes* and *De Wolf v. Raband* in 1 Peters, where Chief Justice Marshall in the first case, and Judge Story in the second case delivered the opinions of the court. In *Crane's lessee v. Morris & Astor*, in 6th Peters, this ruling was reaffirmed. Judge Story again speaking the opinion of the court, briefly said, "A circuit court has no authority so to act, because it was unlawful to do so at common law, and no statute authorized it so to do." For the very same reason, a district court of this Territory has no authority to order a peremptory non-suit against the will of the plaintiff.

The argument in this case on both sides was apparently conducted with the object of inducing this court to look into the whole record, and to say whether there was any evidence to support the plaintiff's case. There are, to our minds, two insuperable objections to this course.

I. By the action of the court below in withdrawing the case from the jury there was no trial of the case there. To do what counsel wish, would be practically to try the case here when there has been no trial below: this cannot be done.

II. There is but one assignment of error, *i. e.*, to the action of the court below in withdrawing the case from the jury, after the plaintiff had closed his testimony on the defendant's motion and against the plaintiff's will: that assignment was well taken, properly excepted to, and that error alone is here to be dealt with. That it was error we think we have abundantly shown. A motion for a new trial was unnecessary in the court below because from the very statement of the case, the trial by jury which was inaugurated was never had, the jury, as the record shows, were discharged without rendering a verdict.

Our code of Civil Procedure is taken from Ohio. In that state the decisions have been conflicting, but the latest rendered, that in the 11 of Ohio, *Byrd v. Blessing* comes nearer to our idea of a true interpretation. Our code is an exact reprint of the Ohio code on the subject of *non-suits*.

Opinion of the Court—Sener, C. J.

The court say in such cases (exactly our statute herein-before quoted) a non-suit may be entered, otherwise there must be a decision on the merits. From their decision we infer that prior to that decision and under the law prior to that time the trial courts had more discretion in ordering non-suits. Indeed the court so holds. But after rendering a proper decision, as we think, the court goes, in our opinion, beyond the code of its state and undertakes to justify its decision upon the facts. This course we do not approve and cannot follow, because to do it is, in our judgment, to have in the first instance in an appellate court, the trial. The trial, at the common law, and under our code, when begun before a jury, must be ended before a jury. Their rights and their provinces are established by the usages of the law for centuries. Courts can in certain cases control their decisions when there is neither law nor evidence to sustain a verdict for a plaintiff: but law and sound practice (at common law, and under our Code of Procedure) have established the methods, they are known to the law and lawyers, and must be pursued. Their observance will always bring a party into an appellate court in such a way that any error or wrong may be reviewed and corrected. And to a practice so sound in principle and so ample as to do justice in all cases, sustained as it is by law and precedents, we hold ourselves bound, rather than to follow a practice which in our judgment would be a violation of law and precedents. For these reasons the judgment of the court below must be annulled and set aside, and the case remanded with direction to the court below to proceed to try this case in conformity with this opinion. The plaintiff in error to have his costs taxed and allowed in both courts.

Ordered accordingly.

Argument for Appellant.

THE UNION PACIFIC RAILWAY *v.* DONNELLAN.

TREASURER OF ALBANY COUNTY: DELINQUENT TAXES: FEES.—The treasurer of Albany county is not entitled to the percentum provided for in section 19, of the act of December 15th, 1877, entitled "An act to provide fees and salaries for the officers of Albany county, and for other purposes," except in cases where he enforces the collection of taxes by making demand upon delinquent taxpayers, levying distress upon property, and selling sufficient to pay the delinquent taxes and costs.

ASSESSMENT: SCHOOL DISTRICTS.—There must be an assessment by districts for district school purposes to sustain a district tax, and it must be a separate roll.

IDEM.—The assessment being the foundation for taxation, where that is wanting all else is a nullity.

IDEM.—The assessment for school district taxes must be made by the county assessor, and where the county assessor for Albany county for the year 1879, failed to make such assessment, the county clerk and county commissioners afterwards made it, *Held*, That they acted without authority of law, and that their acts were void, and that the tax could not be collected.

APPEAL from the District Court of Albany County.

The facts are stated in the opinion.

W. W. Corlett, for appellant.

No assessment of the property of the complainant in said school district was ever made for the year 1879. See *Compiled Laws*, page 527, sec. 7; *Séssion Laws of 1878*, page 117, secs. 1, 2, 3, 7 and 9.

The assessment is the foundation of the right to levy and collect taxes, and without an assessment there is no power to levy and collect taxes. *Thayer v. Stearns*, 1 Pickering, 482; *Miller v. Hale*, 26 Pa. St., 432; *People v. Hastings*, 29 Cal., 449; *Riley v. Lancaster*, 39 Cal., 354; *People v. Sargeant*, 44 Cal., 430; *Williams v. Corcoran*, 46 Cal., 553; *Morrill v. Taylor*, 6 Neb., 241-3.

And if no legal assessment is made the effect is the same

Argument for Appellant.

as if there was no assessment. *Levy v. Burnham*, 15 Mass., 144.

Whenever it is a constitutional requirement that taxation shall be according to value, an assessment by public officers is an indispensable prerequisite to the imposition of the tax. *Cooley on Constitutional Limitations*, page 495; *Organic Act of Wyoming*, sec. 6; *Compiled Laws of Wyoming*, page 534, secs. 52-3.

School districts are excessive in size and area, when the evident object and purpose in thus shaping them was to subject the complainant to an undue proportion of taxes for the support of district schools. *Cooley on Taxation*, pp. 67-8, 71-2, 104-6; *Bradshaw v. Omaha*, 1 Neb., 16; *Morford v. Unger*, 8 Iowa, 90; *Langworthy v. Dubuque*, 13 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 404; *Cheaney v. Hoover*, 9 B. Monroe, 330; *Wells v. Weston*, 22 Mo., 885; *Cooley's Constitutional Limitations*, chap. 14.

If part of a tax is legal and part is illegal, the whole is void, especially when the illegal part cannot be separated from the legal. *Hubbard v. Brainard*, 35 Conn., 563; *Society &c. v. Hartford*, 38 Conn., 274; *Carey v. Stoneham*, 1 Allen, 319; *Stone v. Bean*, 15 Gray, 42; *Wells v. Burbank*, 17 New Hamp., 412; *Bucknell v. Storey*, 36 Cal., 72; *Case v. Dean*, 16 Mich., 30-2; *Clark v. Strockland*, 2 Curtis, 436; *Humper v. McLellan*, 19 Ohio, 308; *Cooley on Taxation*, 295-7.

"It is a universal rule in equity never to enforce either a penalty or a forfeiture." *Story's Equity Jurisprudence*, sec. 1319; *Livingston v. Tompkins*, 4 Johns Ch. R., 431; *Horsburg v. Baker*, 1 Peters R., 232-36; *Story's Equity Pleadings*, sec. 521.

The defendant, if he insists upon his penalty, must at least show that he did whatever was incumbent upon him to make such penalty due. It was his duty, at least twenty days before October 20th, 1879, to notify the complainant of the amount of its taxes and of the day when the same became delinquent, by postal card addressed to the tax-

Argument for Appellee.

payer his, or her agent or attorney. (Laws of 1877, page 106, secs. 18 and 19.)

M. C. Brown, for appellee.

The bill alleges that the tax is illegal and void. This of itself furnishes no ground of equitable jurisdiction on which relief in this court can be granted. See *High on Injunction*, sec. 354; *Dows v. Chicago*, 11 Wal., 108; *Haywood v. Buffalo*, 14 New York, 534; *McPike v. Pew*, 48 Mo., 525; *Warden v. Supervisors*, 14 Wis., 618; *Cooley on Tax*, page 536; *State Railroad Tax Cases*, 92 U. S., 612.

Nor will equity interfere to restrain the enforcement of tax proceedings, on the ground of irregularities or errors in the assessment of the tax, or in the execution of the powers conferred upon taxing officers. The remedy is at law. *High on Injunctions*, sec. 355; *Clinton, etc. Appeal*, 56 Pa. St., 325; *O'Neal v. Virginia, etc.*, 18 Md., 1; *Macklot v. Davenport*, 17 Iowa, 379; *Center, etc. Co. v. Black*, 32 Ind., 468; *Exchange, etc. v. Hines*, 3 Ohio St., 1; *Jackson v. Dewit*, 10 Mich., 248; *Green v. Mumford*, 5 R. I., 472; *Chicago v. Frary*, 22 Ill., 34; *Cooley on Taxation*, pp. 540-541; and authorities there cited.

Non-compliance with some particular direction of a statute is not a ground for equitable interference. *Mills v. Gleason*, 11 Wis., 470; *High on Injunctions*, sec. 356.

In no case will the collection of a tax be enjoined unless irreparable injury is made to appear. *High on Injunctions*, sec. 362; *Ritter v. Patch*, 12 Cal., 298; *Cooley on Tax*, pp. 538-39; *Thompson v. Pacific R. R.*, 9 Wall, 462.

When it is clearly shown by a bill in equity, that numerous and expensive suits at law must follow, in order that complainant may obtain his rights, relief may be granted by a court of equity. *High on Injunctions*, sec. 9. But in this case a multiplicity of suits at law is impossible.

The statement of the bill is that the defendant is about to levy on personal property. A court never interferes to

restrain the collection of an illegal tax on personal property, because it is a mere trespass, and the remedy at law is ample unless the property has some peculiar value to the owner beyond any possible market value, and in like cases. See *Cooley on Taxation*, pp. 538 and 539, and authorities there cited; *High on Injunctions*, sec. 366; *Dean v. Todd*, 22 Mo., 90; 24 Id., 20; *Van Cott v. Supervisors*, 18 Wis., 247; *Dillon Municipal Corporations* bal. 2, page 839, sec. 838; *Peck v. Fox Lake*, 28 Wis., 583; *Dodd v. Hartford*, 55 Conn., 232.

This bill of complainant shows that it should legally pay some portion of the school tax against which it complains; yet the bill does not aver that the legal cannot be separated from the illegal, nor does it offer to pay the legal proportion thereof, and is therefore bad. *High on Injunctions*, sec. 336; *Palmer v. Napoleon*, 16 Mich., 176; *Taylor v. Thompson*, 42 Ill., 10; *Mills v. Johnson*, 17 Wis., 598; 16 Wis., 185; *Commissioners v. Elston*, 32 Ind., 27; *State Railroad Tax Cases*, 22 U. S., 616.

Assent to the levy of a tax, or standing by and failing to avail himself of the remedy provided by law, is estopped in equity. *Kellogg v. Ely*, 15 Ohio St., 64; *Jackson v. Detroit*, 10 Mich., 248; *Weber v. San Francisco*, 1 Cal., 455; *High on Injunctions*, 364.

Our statutes provide a remedy for unlawful taxation. See *Compiled Laws*, page 557, sec. 29; page 563, sec. 43; and page 559, sec. 37.

One averment of the bill of complaint upon which relief is asked is that the collector claims ten per cent. addition to taxes not paid before October 20. The statute expressly provides for such addition. See *Session Laws Wyoming*, 1867, page , sec. .

Statutes authorizing such penalties are held valid and constitutional. See *Lacey v. Davis*, 4 Mich., 140; *Scott v. Watkins*, 22 Ark., 556; *High v. Shoemaker*, 22 Cal., 363; *People v. Todd*, 23 Id., 181; *Mulligan v. Heutragher*, 18 Ia., 171; *Butler v. Bailey*, 2 Ba., 244.

Opinion of the Court—Sener, C. J.

SENER, C. J. This was a suit in chancery brought in said district court in November, 1879, to restrain the defendant from collecting from the complainant a certain school tax claimed to be due from the complainant for the year 1879, to School District Number One, in Albany county, and a certain other sum claimed to be due from complainant to said defendant as a penalty due on the entire taxes of complainant (territorial, county and school district,) for the same year. The complainant's ground of action and relief appear in its bill of complaint, amendment thereto and supplemental bill.

The school tax thus claimed from complainant, and the payment of which it resists, amounts to \$2,497.44, according to complainant, and \$2,641.44 according to the defendant, and is alleged to be illegal and unauthorized for the following reasons:

1. Because no assessment was made of complainant's property in said school district for the year 1879, and no lawful extension of the school tax made upon the tax list for that year against complainant's property in said district.

2. Because said school district was on the 10th day of May, 1878, without warrant of law, and fraudulently as to complainant, extended and increased for the purpose of compelling the complainant to pay an unjust portion of the school district taxes in the district.

The penalty claimed from complainant was \$2,048.33, as alleged by the complainant, or the sum of \$2,190.72, as alleged by the defendant. The complainant alleges that while it is true that it did not pay or tender its taxes in Albany county for the year 1879, until after they had become delinquent, yet that it did make such tender of payment of all that was justly due within a day or two thereafter, and that when such tender was made no steps had been taken to enforce the collection, and that, therefore, under the terms of the law itself, the penalty could not be exacted, and that even if by the terms of the law itself such penalty could be exacted, still the law creating such exaction was void and without the legislative power.

After the filing of the bill of complaint, the complainant paid to the defendant on account of the taxes claimed in Albany county for the year 1879, the sum of \$18,849.88, said amount being all its taxes admitted to be due from it in said county for the year 1879; and being, in fact, all the taxes due, except said school district tax as set out on the tax list, (\$2,547.77,) and a certain other sum of \$509.55, appearing on the tax list as a demand for a tax, but not appearing on said list to be a school tax.

The answer of the defendant, denies that said district was formed for the purpose stated in the bill, but was formed it is claimed, for the purpose of establishing other schools than those in Laramie City, and to establish at the latter place a high school. Said answer further alleges that the property assessed to the complainant in 1879, was \$880,481, instead of \$832,481; admits that no assessment roll was returned of the property in said school district for 1879, but alleges that the assessor did that which was equivalent, to wit: that on the county assessment roll he carried the name of the school district and the valuation of each party's property against his name, so that said county assessment substantially served the double purpose of a county assessment roll, and a school district assessment roll at the same time. The answer further alleges that a tax of 2½ mills on the dollar was extended on the tax list of Albany county for 1879, against complainant's property, as assessed for payment of the bonds of the district, and one-half of a mill to make the tax voted by the district for that year, and that the school district tax on the tax list, against complainant, was \$2,641.44, and that at the time defendant was restrained he was about to levy on the defendant's property to make the taxes claimed, and also to make the sum of \$2,190.72, as a penalty. The answer further denies tender of the payment of all taxes due on October 22, 1879, except said school district tax, but alleges that on October 27, 1879, complainant tendered \$24,401.33, in payment of all taxes

Opinion of the Court—Sener, C. J.

for the year, which it is alleged was \$505.87 less than the proper amount; but it is admitted that said tender was refused because of the refusal to tender said further sum of \$505.87, and the \$2,190.72, claimed as a penalty as aforesaid, and because as it alleges a receipt in full was required. The answer further alleges that one McMurray, an agent of the complainant, made complaint to the commissioners that the tax was erroneous, as claimed from complainant, in that it embraced property in another school district; that such claim was allowed and rebate given to correct the error. The answer denies that the defendant failed or neglected to give the notice, as required by law, when the taxes of complainant would become delinquent, and avers that when restrained he was about to enforce the payment of said taxes. The answer further sets forth what the assessed valuation of complainant's property would be, or was, in said school district before its enlargement in 1879, and what the school district tax would have been, or was, before such enlargement, and that such sum should be paid before granting the complainant any relief.

To this answer the complainant filed a general replication.

A temporary injunction was granted pending the suit, and in the meantime the case was referred to a master, who took the testimony and reported the same, and on December 16, 1880, a decree was entered that complainant pay to defendant the sum of \$1,884.98, as his costs and fees as collector of taxes, being the ten per centum penalty on \$18,849.85, (the amount of taxes which the court found were lawfully due and collectable,) and in case of failure to pay said sum, within five days, the bill of complaint should be dismissed, and in case said sum was paid as decreed, then the said school district tax should be adjudged void, and perpetually enjoined. The appeal was regularly taken and is here to be disposed of. The pleadings show curiously enough that the court below proceeded to dispose of this case without making the substantial party in interest,

to wit: the school board, No. 1, in the county of Albany, a party defendant there. The only party enjoined, or rather made a party there and here, being the treasurer of Albany county; so that it appears that the rights of school district No. 1, were heard and disposed of without its having had any day in court so as to be bound by any decree rendered therein.

We are clearly of the opinion that John W. Donnellan was not entitled to any per centum not penalty, (see chapter 38, Session Laws of 1879, section 1, page 89, and read it in connection with section 19 and 20 of an act to provide fees and salaries for the officers of Albany county, and for other purposes, approved December 15, 1877.) These two chapters and sections plainly show that it was the purpose to attach this as a per centum compensation for the treasurer of Albany county for his services in enforcing the collection of taxes, which enforcement was to consist of making a demand upon tax payers, levying distress upon property, real and personal, of delinquent tax payers, and selling sufficient to pay delinquent taxes and costs. It was a per centum for doing this, not a mere attachment and penalty for doing nothing. This the treasurer of Albany county was to do by proceeding at once after October 20th in each year: but this the said treasurer as collector did not do. He was enjoined by Judge Blair, or temporarily restrained on November 1st, 1879, and only made his demand as shown by the marginal note on the tax list on the 3d of November, 1879, in disobedience of the temporary restraining order, and has never done aught else save to defend this suit to recover his penalty or per centum, and to give his testimony as the record shows. But in any event the right to collect and to distrain must depend, in our opinion, upon an assessment. Now an assessment for school purposes by school district in addition to the two mills provided by section 51, chapter 103, of the Compiled Laws, page 534, is specifically provided for by the Wyoming Compiled Laws, page 534, sections 52 to 55 inclusive, chapter 103, which reads as follows:

SEC. 52. Whenever a sum of money has been voted by a district, the clerk shall, under the supervision of the director, make out and certify, over his official signature, the amount of money voted in his district, and on or before the first Monday of June in each year, cause the same to be filed in the office of the clerk of the board of county commissioners. The clerk shall also, at the same time, notify the county assessor, in writing, of the action of the district meeting. The county assessor shall, at the time of making the county assessment, also assess the property of each district from which he has received notification as aforesaid, and return to the county clerk, at the time of returning the county assessment roll, a separate roll of each district by him assessed, for which services he shall receive five dollars per day for the time actually employed in making such assessment, which sum shall be paid out of the treasury of each district so assessed.

SEC. 53. It shall be the duty of the board of county commissioners to see that the amount of money so voted, be extended by the clerk against the property of the district, in making out the annual tax list, and that sufficient tax be levied upon the property of such district, returned by the county assessor, to make said sum.

SEC. 54. The taxes and assessments of all school districts for all purposes, except as otherwise specially provided by law, shall be collected like county taxes, and all delinquent taxes shall be returned by the collector in the same manner as other delinquent taxes are required by law to be returned.

SEC. 55. The amount of tax collected by the county collector shall be paid over to the county treasurer like other taxes, and shall be held by said county treasurer subject to the draft of the county superintendent, and shall be paid over accordingly; *Provided*, That the money collected on the district tax rolls shall be paid by the collector directly to the treasurer of the proper district, and take his receipt therefor.

The testimony of I. P. Caldwell, the then county assessor, shows that no assessment was made by him for school district No. 1, and whilst there is a certificate from the county clerk made in August, 1879, shows that a district assessment was required so far as the records of that office show, as he certifies, which at best is a mere conclusion of the clerk's, he should have given the certificate from the school meeting itself. It does not appear that the vote was made requiring the levy, or the county commissioners notified before the first Monday in June of that year as the law required, nor is it shown that Caldwell, the county assessor, was ever notified, and as he was on the witness stand and this testimony was very material and no attempt to prove it either by record evidence or Caldwell's own evidence, we are forced to the conclusion upon the facts, that no such notification in writing to Caldwell, the county assessor, was ever given; and therefore it was that Caldwell made no assessment and attempted to make none by means of a separate roll.

This being true the subsequent acts of the county commissioners and county clerk are, in our opinion, of no validity. The appellee has insisted that there is no jurisdiction in equity to enjoin and so to dispose of this case, and yet in every authority cited by him, where power to enjoin was denied, there was an assessment or an attempted assessment by an authorized assessor. Here there was none. Nor can we find a case like the present. Cooley on Taxation, *vide* ed. 1879, sec. 259, lays it down that without assessments taxes have no support and are nullities (citing a number of authorities). And again, p. 530, the same author says when any remedy is allowed in equity, it is by injunction. It is true that most of the cases cited by Cooley as well as by counsel in argument here, grew out of attempts to sustain tax titles, where the defects consist mainly of there having been no assessment. But we think that similar reasoning will hold good here, because our statute says, there must be an assessment by districts for district school purposes to

sustain a district tax, and it must be a separate roll. That it is not so separate in this case, we think fatal and insuperable. As the supreme court of Massachusetts say in *Thayer v. Stearns*, 1 Pick, 423, "We think it clear the legislature intended that they (the taxes) should be separately assessed." (This was where there had been an attempt at assessing by the proper assessing officer, here there has been none). This provision would not have been necessary if they might have been assessed together, and it is never lawful in the construction of statutes to impute useless or frivolous conduct to the legislature; the object undoubtedly was to enable the citizen to scrutinize with more facility his taxes, that he might the better exercise his judgment as to their fairness and legality. The supreme court of Illinois in 98 of their Reports, page 102, says, "A court of equity does take jurisdiction to afford relief against the collection of taxes * * * * * where a tax has been imposed by persons not empowered to levy it, which means to enforce the tax: here the assessment being the foundation, and being wanting, all else is a nullity.

The levying of a tax we take it means, *vide* Webster, "to collect by assessment." Here the assessment was wanting. Whatever may constitute assessment elsewhere, by our law it is and must be done as to school districts by the assessor, as hereinbefore shown.

But our law distinctly provides for a separate roll for each district assessed. Now an assessment according to legal intendment is "A valuation made by authorized persons according to their discretion. It is a valuation of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man must pay." This was not done, nor attempted to be done for the year 1879, by the county assessor, the sworn officer of the law for that purpose for Albany county, and *ex officio* for that district; the records and his sworn testimony alike show it.

There has been a good deal of argument about the right of the district to change the boundaries, by which they were

increased some seventy-five miles. To our view of this case, it is not necessary to consider this question. There was no assessment either for the old district or for the new one for that year, hence it is not material to consider this proposition. But must this tax be lost? Undoubtedly, unless it was assessed.

We think with the supreme court of Massachusetts in *Libbe v. Burnham*, 15 Mass., 147, "that strictness in these particulars is wholesome discipline;" this was a tax case where the assessors had exceeded their duty, and the court set their action aside. In 35 Mississippi 423, *Showalter v. Brown*, this ground was taken. There it was a case tried at law to recover a tax collected without an assessment. Here it must be remembered too, that this is not the regular county or territorial tax, but only a district school tax. And the supreme court of the United States hold in the tax cases, 92 U. S., that the control of the courts over private property in such cases is more necessary than when affecting revenue of the state.

But the counsel of Donnellan gravely present two acts of the railway company as estopping their denying the validity of this tax, and by consequence the penalty, or rather the per-centum.

I. That McMurray, the tax agent of the railway company, appeared before the Board of County Commissioners in October, 1879, and after having examined the tax list, obtained a rebate and expressed himself as satisfied.

First premising that estoppels are odious in law, 1 Serg. & Rawle, 444; and secondly, not admitted in equity against the truth, id. 442, let us answer, that McMurray only bound himself to abide for his company the taxes legally assessed. To do more was beyond the scope of his authority. We have shown the district school tax was not assessed at all by any party authorized to assess, nor was there any legal assessment. The County Commissioners had no authority to act as assessors in the first place, so far as the district school tax was concerned; nor had the county clerk, as he attempted unlawfully to do. Their authority was to deal

Opinion of the Court—Sener, C. J.

and do with assessments made by the assessor, *vide* the italicized words in the following clause of sec. 28, Ch. 109, of Compiled Laws of Wyoming, page 558.

SEC. 28. The board of county commissioners of each county, shall constitute a board for the equalization of the assessment of the several persons in the county, substantially in the same manner as is required by the territorial board of equalization, to equalize among the several counties of the Territory as near as may be, and they shall hold a special meeting at the office of the county clerk, at the county seat, within five days after return of the assessment roll in each year, and shall have the right to adjourn such meeting from day to day for not more than *ten days*, and at such meeting they *shall add to said assessment any taxable property in the county not included in the assessment as returned by the assessor, and shall assess the value thereof, and shall hear and determine the complaint of all persons feeling aggrieved by the assessment of their property as returned by the assessor, and, for the purpose of equalizing the assessment roll, may increase, diminish, or otherwise alter and correct, any assessment.*

They did not pretend then to add to the railway company's tax list any taxable property not included in the assessment, but they did undertake to make the district school No. 1 assessment for the first time, and to blend it with the general county tax, the very thing the law said must not be done, or at least must be done separately; and the county clerk, who it seems had been a railroad employé, an engineer, undertook as his testimony shows, to do it of his own general personal knowledge, and not from a separate assessment roll returned by the assessor. This was clearly illegal and no assessment at all. The blending was as fatal as the original failure of the assessor separately to assess.

II. That the railway paid taxes in 1878 for the district as enlarged, and so ought to pay for 1879 as enlarged. We decline to consider the question of the enlargement or attempted enlargement of district No. 1, for school tax pur-

Opinion of the Court—Sener, C. J.

poses, whereby it was enlarged from twelve to seventy-five miles, merely observing that if it was wrong in 1878, that would neither bind a corporation or court of equity to adhere to it without other reason than that it had been so done before.

As to the item of \$509.55, returned in blank on the tax list for 1879, we cannot see how this can or ought in equity and fairness to be allowed. It ought to be specific in stating what it is for. This is required by sec. 33, of chap. 109, of the Compiled Laws of Wyoming, which is as follows:

SEC. 33. On the fourth Monday in August in each year, the board of county commissioners shall, by an order to be entered of record among their proceedings, levy the requisite taxes for the year, and the same may be levied at any time prior to the fourth Monday in August, if the statement and notice required by section thirty-two of this act has been received from the auditor. Immediately after the taxes are levied, the county clerk shall make out a tax list in tabular form, and in alphabetical order, having distinct columns for lands, and for town lots, and their value, and for the value of personal and other property, and for carrying out, in a column by itself, the amount of each different tax, and having one or more columns for delinquent taxes. Such list may be in the following form:

Owner's Name.	Part of section.	Section.	Township.	Range.	Acres.	Name of Town.	Block.	Value of.	Real Estate.	Value of.	Personal and other property.	Poll Tax.	Territorial.	County Tax.	Poor and Paupers.	Roads and Bridges.	District Court.	School Tax.	Delinquent.	Delinquent.	Remarks.
Prs'ty	N.e. 1/4	6	7	5	160					100	100		50	500	200	200	400	100			
N.e. 1/4	8	6	7	5	80								150	1500	600	200	1200	300			
W. 1/2	5	8	6	4									50	500	200	600	400	100			
N.e. 1/4													100	1000	400	200	800	200			

Opinion of the Court—Sener, C. J.

This is not done, but Donnellan in his testimony says, it was the amount levied to meet the contingent school expenses for that year for district No. 1. As the whole of this is unauthorized, because no assessment was made, this item can be no exception to the rest of the attempted tax. The whole amount of taxes appearing on the tax list of 1879, against the U. P. Railway is \$21,906.20. There is an error even in their own addition of \$1, so, instead of \$21,906.20, making say \$21,906.20, they have paid as a condition precedent for bringing this suit,.....\$18,849.88

Add the school tax erroneously included, as stated in complainant's bill, and admitted in the answer of defendant to be \$2,641.44..... 2,497.44

And this sum put on the tax list, but for what, not appearing, and so disallowed..... 509.55
as against the \$21,906.20, claimed, but if the defendant's statement of the school tax is to be taken as correct, the railway has overpaid; if its own statement, it has underpaid; but in any event it made a tender in the U. S. legal tender of \$20,483.30, more than enough to pay to Meldrum, who was acting for Donnellan, he being absent from the Territory.

As far as Mills' testimony goes, this was an unconditional tender. The defendant in his answer says it was conditional. Mills does not say so, and Donnellan in stating what Meldrum said confirms Mills, and shows that he not only offered the legal tender but \$918.03, in county warrants, but Donnellan wanted his ten per cent. and so refused to accept the taxes.

Our conclusion is that the decrees entered in the court below on the 16th and 24th of December, 1880, be and the same are hereby reversed and annulled, and this cause be remanded to the district court in and for Albany county, with instructions to make the school district No. 1, in the county of Albany, by its director a defendant thereto, with a rule upon said board to show cause, if any it can, why it, its agents, attornies, and all other persons, should not be per-

Syllabus.

petually enjoined and restrained from collecting or attempting to collect anything for or on account of the district school tax in district No. 1, in Albany county, for the year 1879, on the alleged assessment as shown by the record in this case, and hereinbefore declared to be null and void. (As the defendant's statement in his answer admits a sum assessed for the school tax for district No. 1, in Albany county, sufficient to show that the railway overpaid what is due by it on account of its taxes for 1879, we will take that as correct for all the purposes of this case.) That John W. Donnellan, county treasurer of Albany county, and his successors in office, and all other persons, be forever enjoined from collecting, or in any manner asserting any claim to any percentum against the said U. P. Railway Company, either at law or in equity, on account of the alleged failure of said company to pay their taxes on or before October 20th, 1879; the appellant to have costs taxed and allowed in both courts.

Decree reversed.

EDWARDS v. O'BRIEN.

NEW TRIAL.—A new trial will not be granted on the ground that the verdict is not sustained by sufficient evidence, unless it appears that the verdict was clearly and decidedly against the weight of evidence.

IDEM.—A motion for a new trial is addressed to the discretion of the court that tried the case, and the action of the court cannot be assigned for error. But this rule is understood to be subject to the qualification, that if it is clear from the record that the verdict is contrary to law, or there is no evidence to sustain it, it is the duty of the court to set it aside.

ERROR to the District Court of Laramie County.

The facts are stated in the opinion.

Argument for Defendant in Error.

E. W. Mann, for plaintiff in error.

The court erred in overruling the motion of the defendant for a new trial. The verdict being clearly against the weight of evidence it was the duty of the judge to grant a new trial. 3 *Graham and Waterman on New Trials*, pages 1207-8; *Hilliard on New Trials*, page 336, sec. 1, and page 358, sec. 44.

It is evident that the jury either misunderstood the evidence, or else rendered a verdict wilfully in opposition to the facts appearing from it and the instructions of the court, and in either case the judgment of the district court should be reversed. 3 *Graham and Waterman on New Trials*, page 1380; *Hilliard on New Trials*, page 353, sec. 36.

C. N. Potter, for defendant in error.

While the defendant in error insists that the verdict is warranted by the evidence, and is fully sustained thereby, yet it is a well settled proposition and has been frequently followed by this court, that the court will not set aside a verdict and grant a new trial upon the sole ground that the verdict is not sustained by sufficient evidence unless it is manifested that the jury acted in a total disregard of the evidence, or acted against the great weight of the evidence to such an extent as to show that the verdict was the result of improper motives. *Wyoming National Bank v. Dayton*, 1 Wyoming, 336; *Hilliard Flume and Lumber Co. v. Woods*, 1 Wyoming; 2 Nash Pl. and Pr., 1043, 1044.

A verdict will not be set aside on the ground of excessive damages, unless they are so flagrantly outrageous as to show that the jury acted corruptly, or under the influence of passion, partiality or prejudice. 2 Nash Pl. and Pr., 1048.

PARKS, J. This case is fairly stated by the attorneys, substantially as follows:

Opinion of the Court—Parks, J.

This action was originally commenced in the probate court of Laramie county, by the defendant in error, by his filing a claim against the estate of Lucy A. Edwards, deceased. The allowance of the account was resisted by the plaintiff in error, administrator of the estate, and after a trial in the probate court the entire claim was disallowed by said court. The defendant in error then prosecuted an appeal to the district court of Laramie county, when a trial by jury was had and a verdict rendered in his favor. The plaintiff in the court below claimed that in the life-time of Lucy A. Edwards he was interested with her in certain ranch improvements situated near Cheyenne, and made certain expenditures for her benefit, which constituted the greater portion of his claim against her estate: the dealings being made principally with Charles H. Edwards, who the plaintiff claimed was acting as the agent of Lucy A. Edwards. The defendant in the court below denied that his intestate was in any way indebted to the plaintiff (O'Brien), and claimed that in his dealings with O'Brien he was acting on his own behalf, and not as the agent of his wife.

No exception was taken to any ruling or instruction of the court at the trial. The only exception taken was to the overruling of the motion for a new trial, so that no question of law is brought to this court for consideration. The only matter here in controversy is one of fact, namely: whether the verdict of the jury is or is not sustained by sufficient evidence. And even as to the evidence there is but one point, as this case is presented to us, upon which a plausible objection can be made to the verdict of the jury: and that is, whether in contracting the debt in question Charles H. Edwards acted as the agent of Lucy A. Edwards, deceased. Upon this point we find in the transcript of the record testimony as follows:

O'Brien testifies that Mrs. Edwards owned all the property on the ranch, stock and improvements connected with

Opinion of the Court—Parks, J.

it, Mr. Edwards was acting with her, and in the improvements Mr. Edwards acted for her. (See page 7 of the transcript of the record.)

And that all the property belonged to her, and he was doing business for her. He says: "What accounts I had with himself personally were outside of the ones I kept against her. Her business was superintended by him." (See page 8.)

On page 17 he testifies that Edwards told him that everything was put in his wife's name before they moved to the ranch, on account of a judgment against him, and this was before the bill sued on was made.

The inventory, the appraisement bill, the testimony of the defendant himself on the 20th page, the testimony about the brand, all tend to prove the claim of plaintiff.

It is said in Hilliard on New Trials to be the prevailing rule, that a verdict will not be set aside unless clearly, palpably, decidedly and strongly against the evidence; that the verdict must be so much against the weight of evidence as on the first blush to shock the sense of justice; or unless there has been a flagrant abuse of discretion, that courts will never in the absence of the most satisfactory evidence that the verdict is erroneous, substitute their impressions for the opinion of the jury. And this statement of the law is supported by reference to a long list of decisions. This is said to be more especially true of a court of error or an appellate court, for the reason that the revising court can have but an imperfect view of the nature of the testimony taken below. Where the sole ground of objection is that the verdict is contrary to evidence, it is held that the jury are the exclusive judges of the weight of the evidence. The following language is taken from one of the oldest decisions made in this country upon the subject of new trials: "A new trial will not be granted unless a verdict is very clearly and decidedly against the weight of evidence, the courts not interfering with the appropriate function of the jury as a tribunal for the decision of questions of fact

except in extreme cases. Setting aside verdicts as against the weight of evidence, is not the daily bread but the extreme medicine of the law, and like other powerful remedies should be very sparingly administered." *Bartholomew v. Clark*, 1 Conn., 482.

And this doctrine has been adhered to in that state for almost a century, and substantially has been held to be the law by nearly all the appellate courts of this country, including the supreme court of this Territory. The power of an appellate court to reverse the decision of the judge who tried the case refusing to set aside the verdict of a jury has long been settled: but it is also settled that it should only be exercised in extreme cases. The question before this court is not whether the verdict of the jury in favor of the plaintiff, or the refusal of the court below to set aside that verdict is right, but whether the case is so extreme that it is the duty of this court to reverse the action of both the court and jury. It is probable that this court would not have found as the jury did, but that is not the question here. The general theory upon which a new trial is applied for and insisted upon even in appellate courts, appears to be that the party has a right to it if the verdict seems to be against the preponderance of evidence. But the law is so well settled to the contrary that it is unnecessary to multiply authorities. No exception having been taken in this case except the refusal of the court below to grant a new trial, it is even doubtful whether there is anything before this court for review.

The supreme court of the United States in a recent case say, that they have uniformly held that as a motion for a new trial is addressed to the discretion of the court that tried the cause, the action of the court in granting or refusing to grant such motion cannot be assigned for error. (See *Railway Company v. Heck*, 12 Otto, 120.

This rule is understood to be subject to the qualification that if it is clear from the record that the verdict is contrary to law, or there is no evidence to sustain it, it is the duty of

Opinion of the Court—Parks, J.

the court to set it aside. (See *McNamara v. O'Brien*, decided at the last term of this court and to be reported in 2 Wyoming.)

This case not coming within these exceptions the action of the district court in refusing to grant a new trial must be affirmed.

Judgment affirmed.

INDEX.

ACCEPTANCE. (*See Railways, 2.*)

ACCESSORIES.

ACCESSORIES : INDICTMENT.—An indictment, in charging an accessory before the fact, should be as full, complete and specific as in charging a principal, and nothing needed should be embraced by words of reference to the preceding count charging the principal. *Territory v. Conley*, 381.

ALBANY COUNTY, TREASURER OF. (*See Taxation, 7.*)

ALTERATIONS IN WRITTEN INSTRUMENTS.

ALTERATIONS IN WRITTEN INSTRUMENTS.—An alteration in a written instrument, whether for the payment of money or for other purposes, which does not affect the original design of the parties, either by enlarging or diminishing the obligation, however improper the alteration may be, does not invalidate the instrument, nor change the weight of the obligation. *McLaughlin v. Venine*, 1.

APPEAL. (*See Practice, 3.*)

FROM JUSTICE'S COURTS. (*See Undertaking.*)

APPELLATE COURTS. (*See Jurisdiction, 2.*)

ASSESSOR. (*See Taxation, 5.*)

ASSIGNMENT.

1. **ASSIGNMENT.**—A provision in an assignment which reserves any of its assets to the debtor before full payment of creditors, vitiates the instrument whether the reservation be provided for by coercive terms or not. *Ware et al. v. Wanless et al.*, 144.
2. **IDEM.**—An assignment which contains coercive terms, whether their aim is to provide a reservation or not, vitiates the instrument *a fortiori*, if they do aim at a reservation. The debtor cannot prefer himself to the creditor in respect to the assets, and a provision in the assignment which tends to secure, is a provision which does not secure that preference, but renders the assignment void. *Id.*

3. **FRAUD.**—Where an assignment exhibits on its face constructive fraud, that feature cannot be overcome by proof that there was no fraud in fact, and parties to the instrument are estopped from alleging good faith against its import; fraud in law is as fatal as fraud in fact, and equity will not sever the elements of fraud from the instrument, and give effect to the rest. The rule at law and in equity, is to treat the assignment, if fraudulent, as void *in toto*. *Id.*

AUTHENTICATION.

RECORD : COPY : AUTHENTICATION.—When a document is authenticated by a clerk of court, under the seal of the court, as a full and true copy of the record judgment in that court, it is a sufficient authentication, for use in any other court within the territory. *Brophy v. J. M. Brunswick & Balke Co.*, 86.

BANKRUPTCY.

1. **BANKRUPTCY.**—The object of the bankrupt act is to secure to creditors the largest benefit of a common fund, by speed and economy in the administration of it. *McLaughlin v. Upton, Assignee*, 32.
2. **LIMITATIONS.**—The clear intention of the act was to impose two years as the absolute limit to the capacity of the assignee, within which to sue or be sued,—and this in order to promote dispatch in the liquidation of the bankrupt estate by avoiding the indefinite, wasteful, and vexatious delays, which would be necessarily consequent upon the power of waiver, was the act a limitation of the remedy alone. Hence, after the two years, for all the purposes of suit being commenced by or against the assignee, his office has expired and his existence ceased. *Id.*
3. **JURISDICTION.**—As the assignee is powerless to acquire, so the court is powerless to admit him to a status within the court. This want of power is want of jurisdiction. Want of jurisdiction is a radical, and therefore incurable defect. The parties cannot waive, nor can the court ignore it. A court does not create its jurisdiction: it must accept and confine itself to what is created for it: hence *ex necessitate* such defect of jurisdiction carries its object with it; appearing in the case, it is the imperative duty of the court, of its own motion, to treat the proceedings as null and to dispose of them accordingly. *Id.*

BILLS OF EXCHANGE.

BILLS OF EXCHANGE.—Orders for the payment of money, not payable absolutely, but out of an alleged indebtedness, and not payable to order or for a sum certain, are not bills of exchange. *Stebbins, Post & Co. v. The U. P. Ry. Co.*, 71.

CITIES.

The failure on the part of a city to exercise judicial power, in the absence of malice and corrupt intention, constitutes no ground of action. *Kent v. City of Cheyenne*, 6.

COMMON CARRIERS. (*See Lien.*)

CONDITIONAL SALES.

1. **CONDITIONAL SALES.**—In sales of personal property, when by the terms of the contract of sale the title does not pass until payment is made, and in the meantime the property is to remain the property of the vendor, who, in case of default in payment has the right to repossess himself of and to remove it without legal process, the vendor may reclaim it, even though it be in the hands of a third party, who takes it in good faith and without notice. *Warner v. Roth*, 63.
2. **IDEM.**—The contract does not have to be acknowledged and filed with the county recorder under sections two and three of chapter twenty of the Compilation, relating to chattel mortgages, as it does not come within the provisions of sections one and six of that act. The instruments contemplated by these sections, simply create collateral security in one party upon the property of another. *Id.*

CONVEYANCES. (*See Fraudulent Conveyances.*)

COSTS.

COSTS.—At common law, when the government is a party, an adverse judgment would not embrace costs ; but when the government institutes the suit and furnishes the requisite security, electing to provide a fund for the costs, and to accept an adverse judgment charging that fund, the costs will be embraced in the judgment. *The U. P. R. R. Co. v. The U. S.*, 170.

DECREE.

DECREE : MODIFICATION.—There were three defendants, but the district court by inadvertence rendered a decree against one alone, and an appeal was taken as to two of the defendants only. *Held*, that if the appeal had been taken against all, the decree would have been modified into a decree against all, but if it had been taken against two of the defendants alone the decree could only be modified into a decree against them alone. *Beaucare v. Sawyer et al.*, 125.

DEFAULT.

1. **DEFAULT : JUDGMENT.**—When the district court holds a default not excused, it cannot be said that its decision was one way and the evidence all the other, and the judgment be reversed, even if the evidence would seem to justify a different conclusion. *Brophy v. J. M. Brunswick & Balke Co.*, 86.
2. **IDEM.**—Judgments on default are not to be lightly opened ; a party asking to be let in, must make a clear case.—*Id.*
3. **IDEM.**—A default is the non-appearance of the plaintiff or defendant at court within the time prescribed by law to prosecute or defend ; when the plaintiff makes default, a non-suit may be entered ; when the defendant makes a default, an inquest may be taken, and in each case judgment to correspond will be rendered.—*Id.*

4. **DEFAULT.**—Where a party has been duly served with a summons he cannot complain that a judgment by default has been rendered against him, if he does not appear and defend at the proper time. *Garbanati v. Beckwith & Co.*, 216.

DEMURRAGE.—(See *Railways*, 1.)

(DEMURRER.—See *Former Adjudication.*)

EJECTMENT.

1. **EJECTMENT.**—In ejectment the plaintiff must recover, if at all, upon the strength of his own title. If the defendant can show an outstanding title in another, it will defeat the plaintiff's right of recovery. *Lee v. Cook & Corey*, 312.
2. **EJECTMENT.**—In ejectment, it is a uniform principle that if both parties claim title from the same source, it is treated, for all the purposes of the case, as if the title resided in that source, each party is estopped from denying it, and so far as respects that source the controversy is reduced to the inquiry: which party, plaintiff or defendant, if either has title from that source. *Hecht v. Boughton*, 385.

ERROR.

1. **ERROR.**—Under section 522, of the Compiled Laws, proceedings in error not brought within one year after the date of the judgment below, will be dismissed on motion. *Snyder v. James*, 252.
2. **ERROR.**—The supreme court will not consider alleged errors in the record unless accompanied by a bill of exceptions, in which the motion for a new trial, made in the court below, is incorporated. *Garbanati v. County Commissioners*, 257.
3. **PETITION IN ERROR: ADMINISTRATOR TO DETERMINE WHEN TO PROSECUTE.**—Where an administrator refused to prosecute a petition in error, and the surety upon the supersedeas bond moved for leave to prosecute, *Held*, That the administrator had the right to determine whether the interests of the estate required that the prosecution be continued or abandoned, and that his refusal to appear and prosecute must be treated as conclusive evidence of his election not to prosecute. *McNamara v. O'Brien*, 441.
4. **IDEM.**—In no event could the surety on the supersedeas bond be allowed to prosecute; that would be to allow him to control the prosecution, to interfere with the trust, and to deprive the administrator of the power to protect the estate.—*Id.*
5. **ERROR.**—Whenever error is apparent upon the face of the record, the rule is, that it is open to re-examination whether it be made to appear by bill of exceptions or in any other manner. *McNamara v. O'Brien*, 447.

EVIDENCE.

1. **WEIGHT OF EVIDENCE.**—Where a case has been fairly presented to a jury upon conflicting testimony, their verdict will not be interfered with, unless the same is clearly and manifestly against the weight of evidence. *O'Brien v. Chintiquy*,

2. **EVIDENCE.**—A party who calls out the fact that a bond is in existence, cannot complain of the production of the instrument to confirm the fact. *Fillmore v. The U. P. R. R. Co.*, 94.
3. **IDEM.**—A party cannot complain that he is held to the effect of evidence which he vouches for, by producing the witnesses who gave it.—*Id.*
4. **IDEM.**—Evidence introduced in support of a counter-claim is inadmissible where it tends to establish a cause of action different from that set up in the answer; and without consent the cross suit cannot be amended so as to admit the evidence. *Fein v. Tonn*, 113.
5. **EVIDENCE: OBJECTION.**—If a party, against whom an objection as to evidence is made, is willing to waive a specification of the grounds, the court is not bound to excuse the omission, and may disregard the objection. *Farrell v. Alsop*, 185.
6. **EVIDENCE: INSTRUCTIONS.**—Where the defendant was being tried for embezzlement, and while testifying as a witness in his own behalf, was asked, if he had made any arrangement with the agent of the government in respect to the sugar in question, and having answered in the affirmative, he was then asked the following question: "You may now state what that arrangement was;" objection being made, the court refused to let the witness answer. At the conclusion of the testimony the defendant requested the court to give the following instructions to the jury: "*Ninth*—That if the defendant took the property described in the indictment, under an honest claim of right to do so, and under an honest belief that he had authority to take the same and dispose of it, then the act of taking would lack the felonious intent necessary to constitute the crime charged, and it is for the jury to say, in view of all the facts and circumstances in evidence, what the intention of the defendant was." "*Tenth*—That if the defendant took the property described in the indictment, and converted the same to his own use under an agreement with the officers of the United States that he should do so, and return the like amount of property to the United States; or if he took such property with an honest belief on his part that he had such agreement and authority, then he cannot be found guilty as charged in the indictment." Both of which instructions were refused. *Held*, That the district court erred in rejecting the answer of the defendant in reference to the arrangement made with the agent of the government, and also in refusing instructions nine and ten, requested by the defendant, for the reason that if he converted the property, under an agreement with the agent of the government to do so, and with an honest belief on his part that he had authority, whether he had or not as a matter of fact, he could not be guilty of embezzlement. And whether or not these facts existed was a question for the jury. *McCann v. The United States*, 274.

EVIDENCE, WEIGHT OF—(See *Jurisdiction*, 2.)

EXCEPTION.

1. **EXCEPTIONS.**—A general exception to a charge given to a jury, without specifying any supposed error, or indicating the grounds of the excep-

tion, will not be regarded by an appellate court. *Fillmore v. The U. P. R. Co.*, 94.

2. **EXCEPTIONS: PROSECUTING ATTORNEY.**—Under the laws of this Territory, the prosecuting attorney may take exceptions to any opinion or decision of the court, during the prosecution of the cause, which he may think erroneous. *Territory v. Nelson*, 346.
3. **BILL OF EXCEPTIONS.**—The plaintiff in error must present his bill of exceptions to the court for allowance, not to a judge out of court, and on a day not beyond the first day of the next succeeding term. *Woods v. Hilliard Flume & Lumber Co.*, 457.
4. **BILL OF EXCEPTIONS: ALLOWANCE.**—Under sections 300 and 303 of the Civil Code a bill of exceptions to be allowed must be presented to the court for allowance, and on a day not beyond the first day of the next succeeding term. *Jubb v. Thorp*, 406.

FEEES.

FEES: JAILER.—Chapter 49, section 12 of the Compiled Laws provides, "That for any service rendered by an officer wherein no fees are allowed by this act, nor any other act or provision of law, such officer shall be allowed a reasonable compensation therefor." *Held*, this provision did not apply to the payment for services of a jailer who had been hired by the sheriff. *County Commissioners v. Johnson*, 259.

FORMER ADJUDICATION.

FORMER ADJUDICATION: JUDGMENT ON DEMURRER.—Where a petition on a cause of action, appearing on its face to be barred by the statute of limitations, is demurred to for that reason, and the demurrer sustained, and another suit is subsequently brought upon the same cause of action, the petition therein alleging facts, showing that the statute of limitations has not run, the latter suit cannot be maintained, as the judgment upon the demurrer in the first suit, although error, was a former adjudication and a bar to any other suit. *Price v. Bonni-field*, 80.

FRAUD. (See Assignment, 3.)

FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.—Where a party executes a mortgage upon his personal property, without consideration, and without a change of possession, and for the sole purpose of hindering and delaying his creditors; such a conveyance is fraudulent and void, and the mortgagee acquires no rights under the mortgage upon which he can base an action. The creditors of the mortgagor may levy upon and sell the property covered by the mortgage. *Carr v. Ryan*, 130.

INDICTMENT.

1. **INDICTMENT: EMBEZZLEMENT.**—An indictment must set forth facts sufficient to constitute the given offense, so as to notify the accused of the issue he has to meet; and unless it does this, it charges noth-

ing on which an issue can be raised by plea of not guilty; this rule is founded on a principle that inheres in all criminal cases. Hence an indictment for embezzlement must set forth the actual fiduciary relation and its breach. *McCann v. The U. S.*, 274.

2. **IDEM.**—A statute, in creating a crime, defines it; and may employ for the purpose a proposition of fact, or one of law only; all the ingredients of fact that are elemental to the definition, must be alleged in the indictment, so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the act, that will do; if not, other allegations must be used; hence the rule to follow the words, is safe only when its effect will be to follow the act. *Id.*
3. **IDEM.**—A count in an indictment, which alleges that by one and the same act the defendant embezzled and stole the property; by one act committed upon it two dissimilar crimes, the commission of one of which negates the possibility of the commission of the other, nullifies itself and charges nothing; tenders no issue, and will not support a verdict of guilty. *Id.*

INSTRUCTIONS. (*See Evidence*, 6.)

JUDGMENTS.

1. **JUDGMENT.**—Where the basis of a judgment has been laid, the point for entering judgment has been reached, the order for its entry is a form, and any judge qualified to act in the case may make the order. *The U. P. R. R. Co. v. Byrne*, 109.
2. **JUDGMENT: MECHANICS' LIEN.**—The action was for a balance due upon account for work and labor done and materials furnished, and for the enforcement of a mechanics' lien against certain buildings. The petition failed to show that the defendant was the owner of the land upon which such buildings were situated. The jury returned a verdict for the plaintiff for \$171.68 damages and costs, and thereupon the court rendered judgment for the amount of the verdict and costs, and in continuation adjudged that, in case of non-payment of the damages and costs within thirty days, the premises, described in the petition, should be sold to satisfy the judgment: *Held*, that the judgment as to the damages and costs being a general and personal judgment is affirmed to that extent, but as the petition failed to allege that the defendant was the owner of the land upon which the buildings were situated, the judgment so far as it is a lien judgment is reversed. *Fein v. Davis*, 118.
3. **JUDGMENT: LIEN.**—Where an execution is issued, and levied on real estate while the lien of a judgment thereon is in force, and a sale under the execution is properly made, and a deed, executed to the purchaser, such deed will relate back to the date of the judgment, and the title which the defendant had at that time will pass. *Lee v. Cook & Corey*, 312.
4. **JUDGMENT.**—The judgment of every court of competent jurisdiction is presumed to be correctly entered until the contrary affirmatively appears. *O'Brien v. Clark, Adams et al.*, 443.

5. **IDEM.**—A party asking a review and reversal of a judgment, in the supreme court, must bring the record which he seeks to have inquired into; if he fails to do this, the judgment will be affirmed as being *prima facie* correct, without going into the merits. *Id.*
6. **JUDGMENT.**—Section 394, of the Civil Code, provides that "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." Where the record shows what purports to be a judgment for costs only, but in which the amount of such costs is left blank, the judgment not being exact as to the costs, will be reversed, and the case remanded for a new trial. *Mosher v. County Commissioners*, 462.
7. **JUDGMENT.**—(*See Default*, 1.)

JUDICIAL POWER. (*See Cities.*)

JURISDICTION.

1. **IN BANKRUPTCY CASES.**—(*See Bankruptcy*, 3.)
2. **JURISDICTION OF APPELLATE COURTS: WEIGHT OF EVIDENCE.**—Where an appellate court is empowered to revise upon the facts, it can never reverse them, simply because upon the evidence, as submitted to it, it would have arrived at a different conclusion, and can only reverse where the verdict,—or if the trial was by the court, without a jury, the findings below,—were so clearly against the weight of evidence that no mind of fair intelligence, faithfully exercised, can be reasonably supposed to have arrived at the result complained of. *Fein v. Tonn*, 113.
3. **JURISDICTION.**—When the United States voluntarily comes into court invoking the action of the law in its behalf, it submits itself to the jurisdiction of the court and stands thereafter upon the same footing; and its rights must be determined by the same principles as if it were a private suitor. *The U. P. R. R. Co. v. The U. S.*, 170.

LACHES.

LACHES.—As between two innocent parties, that one who has been guilty of laches must suffer the wrong of a third. *Stebbins, Post & Co. v. U. P. Railway Co.*, 71.

LANDLORD AND TENANT.

LANDLORD AND TENANT.—Under chapter 77 of the Compiled Laws of Wyoming the relation of landlord and tenant does not exist by implication, or operation of law, except a tenancy by sufferance. *McNamara v. O'Brien*, 447

LEGISLATIVE POWER.

LEGISLATIVE POWER.—The organic act gives the legislature power over all proper subjects of legislation, and in the absence of an express limitation upon this power, the legislature may pass laws fixing a standard of fees for the officers of the several counties within the territory, no two of which are exactly alike. Such a law is no breach of contract. *Castle v. County Commissioners*, 126.

LIEN.

COMMON CARRIER'S LIEN.—The property of the Government is not exempt from a common carrier's lien for freight. There is no exception to the general rule in favor of the United States or any other government or sovereignty; the exemption would incalculably cripple the public service, the liability would equally promote it; no consideration of justice or policy favors, every consideration of justice and policy forbids the exemption; the liability enlarges, the exemption narrows sovereign action; the liability, not the exemption, is a privilege, and therefore an attribute of sovereignty. *The U. P. R. Co. v. The U. S.*, 170.

LIMITATIONS. (*See Bankruptcy, 2.*)

MARRIED WOMEN.

MARRIED WOMEN.—Where there was evidence tending to show that the defendant was a married woman at the commencement of the suit, but it did not appear nor was there evidence tending to show that she was a married woman at the time of sale to her of certain goods for which she was sued alone, *Held*, that at the common law she being under coverture at the time suit was brought, her husband was a necessary co-defendant, and that the act of December 4, 1869, entitled, "An act for the protection of married women," could not apply, nor its effect be considered. *Granger v. Lewis Bros.*, 231.

MECHANIC'S LIEN.—(*See Judgment, 2.*)

MISTAKE.—(*See Payment.*)

MODIFICATION OF DECREE.—(*See Decree.*)

NEW TRIAL.

1. **APPLICATION FOR NEW TRIAL—EXTENSION OF TIME.**—Sec. 308 of the Civil Code, provides, that the application for a new trial must be made at the term at which the verdict is rendered, and except for the cause of newly-discovered evidence, within three days after the rendition of the verdict, "unless unavoidably prevented." *Held*, that this provision is directory merely, and that the matter of extending the time in which to make the application is within the discretion of the district court. A motion to dismiss the writ of error in the supreme court on the ground that the time for making the application for a new trial was extended beyond the three days, denied. *McLaughlin v. Upton*, 27.
2. **NEW TRIAL.**—A mere statement of abstract propositions unaccompanied by evidence for testing them is not a motion for a new trial; it is a mere inchoate proceeding which should be stricken from the files. *U. P. R. Co. v. Byrne*.
3. **IDEM.**—It is no ground of objection that a motion for a new trial was

not heard by the judge who tried the case, where the judge hearing the motion does so at the request of the moving party. *Id.*

4. **IDEM**—If the motion for a new trial intelligently refers the court to prior exceptions, it is the duty of the court to investigate them. *Granger v. Lewis Bros.*, 231.
5. **IDEM**—On the hearing of a motion for a new trial on the ground that the verdict was not sustained by sufficient evidence, it must appear either that there was a conflict of evidence and that the verdict was against the weight of evidence, or that the case went to the jury on evidence insufficient to establish a *prima facie* case for the plaintiff. *Id.*
6. **IDEM**.—The court will not set aside a verdict and grant a new trial upon the ground that the verdict was not sustained by sufficient evidence unless it is manifest that the jury acted in a total disregard of the evidence, or acted against the great weight of evidence to such an extent as to show that the verdict was the result of improper motives. *Garbanati v. William Hinton*, 271.
7. **IDEM**.—A new trial will not be granted on the ground that the verdict is not sustained by sufficient evidence, unless it appears that the verdict was clearly and decidedly against the weight of evidence. *Edwards v. O'Brien*, 493.
8. **IDEM**.—A motion for a new trial is addressed to the discretion of the court that tried the case, and the action of the court cannot be assigned for error. But this rule is understood to be subject to the qualification, that if it is clear from the record that the verdict is contrary to law, or there is no evidence to sustain it, it is the duty of the court to set it aside. *Id.*
9. **NEW TRIAL, MOTION FOR**.—A motion for a new trial in the district court was unnecessary, for the reason that the trial by jury, which was inaugurated, was never had. *Mulhern v. The U. P. R. R. Co.*, 465.

NON-SUIT.

1. **NON-SUIT**.—It is error for the court to grant a non-suit upon the defendant's motion, and against the will of the plaintiff, his objection being made at the time and an exception duly taken. *Hoy v. Smith*, 459.
2. **IDEM**.—If the law was against the plaintiff, the court might of its own motion, or upon the request of the defendant, have instructed the jury to find for the defendant, and if the court so held or believed, it would have been its duty to so instruct. *Id.*
3. **NON-SUIT**.—A non-suit is not a judgment nor the final determination of a cause, and under section 379 of the Civil Code a district court of this Territory has no authority to order a peremptory non-suit against the will of the plaintiff. *Mulhern v. The U. P. R. R. Co.*, 465.

OFFICERS.—(See Fees.)

PAYMENT.

PAYMENT: CONSIDERATION: MISTAKE.—Money paid by one party to another, without consideration and by mistake, becomes so much money received by him, to the use of the party paying, for which he is ac-

countable on demand. *Stebbins, Post & Co. v. The U. P. Railway Co.*, 71.

POST TRADER.—(See *Taxation* 1 and 2.)

PRACTICE.

1. **PRACTICE: WRIT OF ERROR: RETURN.**—The Supreme Court will permit delays in the return of the writ of error, for the purpose of securing to the plaintiff his appeal, bringing up the record, and disposing of the case according to the rights of the parties; but this permission is extended only where it perceives no intention on his part to abuse the process; when, therefore, it discovers that intention, its duty is the reverse. The writ of error, as a writ of right, is limited by this condition, and the court should impose the limit. Its power for the purpose is inherent. *Fallen v. Ferris*, 144.
2. **PRACTICE: RULES OF COURT: BILL OF EXCEPTIONS.**—Sec. 4, chapter 103 of the Compiled Laws makes it the duty of the supreme court to prescribe rules of practice, and such rules, when not in conflict with the Organic Act or the laws of the Territory are given all the force of statute law. Therefore Rule 5 of this court, which provides, that "no case will be heard in court unless a motion for a new trial shall have been made in the court below in which all matters of error and exceptions have been presented, argued and the motion overruled and exceptions taken to the overruling of said motion, all to be embraced in the bill of exceptions," is in the very line of the court's duty to prescribe, and was not intended to work an injury, but to point out in practice, what would be required of all who come into this court seeking to set aside decrees or judgments of the court below. *Johns v. Adams Bros.*, 194.
3. **PRACTICE: APPEAL.**—Where the appellant filed a disclaimer in the district court to a bill to foreclose a mortgage, upon which no issue was joined, *Held*, that it was estopped, in the supreme court, from asserting interest, and having no interest, its appeal could not give the court jurisdiction to vacate or modify the decree of the court below. And having no standing in this court to complain of the decree below, the appeal will be dismissed with costs. *Hinton v. Winsor et al.*, 206.

PRECINCT.

PRECINCT.—The words "precinct," "township" and "school district" as used in the act of Dec. 13th, do not refer to, or include municipal corporations. *The U. P. Railway Co. v. Ryan et al.*, 408.

PROSECUTING ATTORNEY. (See *Exceptions*, 2.)

RAILWAYS.

1. **DEMURRAGE, RAILWAYS.**—A railway company is entitled to demurrage where the consignee of goods, after reasonable notice from the company, neglects or refuses to unload the cars in which the goods were shipped. *Kansas Pacific Railway v. McCann*, 3.

- 2. ACCEPTANCE : PAYMASTER, RAILWAY COMPANY.**—The office of a travelling paymaster of a railway company, is simply to pay the indebtedness specified upon the roll; the roll limits his authority, and he has no power to contract for his principal; he cannot accept orders drawn upon it. *Stebbins, Post & Co. v. The U. P. Railway Co.*, 71.

RECORDS. (*See Authentication.*)

RELINQUISHMENT. (*See Settlement.*)

REMITTITUR.

REMITTITUR.—Where a remittitur is filed, it is only an admission that the verdict was excessive in the amount remitted. *The U. P. R. R. Co. v. Byrne*, 109.

REPLEVIN.

UNDERTAKING IN REPLEVIN.—In replevin, at the common law, a judgment could only be for a return of the property, but by the statutes of this territory, an undertaking is given as a substitute for the property, and is to be charged with the judgment. *The U. P. R. R. Co. v. The U. S.*, 170.

RETURN. (*See Practice*, 1.)

SALES. (*See Conditional Sales*, 1 and 2.)

SERVICE. (*See Summons.*)

SETTLEMENT.

SETTLEMENT : RELINQUISHMENT.—If upon a settlement a party relinquishes a just demand in order to obtain the settlement, he cannot afterwards claim the demand; the settlement is a consideration for the relinquishment. *Farrell v. Alsop*, 135.

STATUTES.

- 1. STATUTES : CONSTRUCTION.**—Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" will be construed to mean "shall." *Territory v. Nelson*, 346.
- 2. IDEM.**—Section 1895 of the Revised Statutes of the United States provides: "Any person convicted by a court of competent jurisdiction in a territory, for the violation of the laws thereof, and sentenced to imprisonment, may at the cost of such territory, on such terms and conditions as may be prescribed by such rules and regulations, be received, subsisted and employed in such penitentiary during the term of his imprisonment, in the same manner as if he had been convicted of an offense against the laws of the United States." *Held*, that the word "may" used in the statute means "shall," and that the penitentiary at or near Laramie City, erected by authority of the laws of congress, is the only penitentiary for the confinement of persons con-

victed in the several district courts of this Territory, for offenses against the laws of the Territory, and the punishment for which is by territorial statutes, prescribed to be confinement in the penitentiary, unless congress shall otherwise legislate. *Id.*

STENOGRAPHER.

STENOGRAPHER'S NOTES.—The act of December 15, 1877, in relation to the appointment of a territorial stenographer, which provides, that a transcript of his notes shall be *prima facie* evidence of the proceedings does not mean absolute, and does not affect section 303 of the Civil Code requiring a certified and absolutely true statement of the evidence to be taken up in all proceedings in error. *Johns v. Adams et al.*, 194.

SUMMONS.

SUMMONS: PRESUMPTION OF SERVICE.—This court cannot presume, in any case, that a summons was duly issued and served, unless the record affirmatively shows these facts. *Garbanati v. Beckwith*, 213.

TAXATION.

1. **TAXATION.**—The territory has no right to tax the property of a post trader at a military post situated upon an Indian reservation, and the tax if paid can be recovered back. *Moore v. County Commissioners*, 8.
2. **IDEM.**—It is immaterial that such trader furnished the lists and valuations on which the taxes were levied; the right to impose a tax, and as preliminary to it to take a list and valuation of the property intended to be taxed, depends not upon the consent of the party taxed, but upon the power of the government which assumes to exercise the right, and upon the functions of the officers through whom it assumes to exercise it. The territory is totally excluded from the exercise of political power over the Indian country, either to regulate the intercourse of its subjects with it, or to extend its municipal authority into it. *Id.*
3. **TAXATION: MUNICIPAL: RAILWAYS.**—The system of taxation for municipal purposes, is distinct and independent of that for state and county purposes. The act of the legislative assembly entitled, "An act in relation to the assessment of railways and telegraph lines," approved Dec. 13th, 1879, does not govern the city of Cheyenne in its taxation of property within its corporate limits for municipal purposes. The act was intended to affect county organizations, and not particular municipalities, or municipal corporations. *The U. P. Railway v. Ryan et al.*, 408.
4. **IDEM.**—The property of railway and telegraph lines within the limits of the city of Cheyenne, is taxable in the same manner as other property in the city, according to the provisions of the city charter. *Id.*
5. **ASSESSOR.**—Where a power is given to a city council to levy and collect taxes, and no officer is provided, in a charter, as a necessary consequence the right to levy and collect taxes, would carry with it the power and authority to employ the necessary machinery for that pur-

pose ; the city clerk of the city of Cheyenne, as *ex officio* assessor, had authority to make the annual city assessment. *Id.*

6. **UNJUST ASSESSMENTS : RELIEF.**—Before a party can, or ought to have any standing in a court of equity to receive relief on account of unjust assessments by way of injunction, he should pay what is right-fully due. In this case the railway company failed to pay to the city of Cheyenne the taxes properly due, and therefore the complaint of unfairness furnished the company no ground for relief. *Id.*
7. **TREASURER OF ALBANY COUNTY : DELINQUENT TAXES: FEES.**—The treasurer of Albany county is not entitled to the per centum provided for in section 19, of the act of December 15th, 1877, entitled "An act to provide fees and salaries for the officers of Albany county, and for other purposes," except in cases where he enforces the collection of taxes by making demand upon delinquent taxpayers, levying distress upon property, and selling sufficient to pay the delinquent taxes and costs. *The U. P. Railway Co. v. Donnellan*, 478.
8. **ASSESSMENT : SCHOOL DISTRICTS.**—There must be an assessment by districts for district school purposes to sustain a district tax, and it must be a separate roll. *Id.*
9. **IDEM.**—The assessment being the foundation for taxation, where that is wanting all else is a nullity. *Id.*
10. **IDEM.**—The assessment for school district taxes must be made by the county assessor, and where the county assessor for Albany county for the year 1879, failed to make such assessment, the county clerk and county commissioners afterwards made it, *Held*, That they acted without authority of law, and that their acts were void, and that the tax could not be collected. *Id.*
11. **TAX PROCEEDINGS.**—Tax proceedings being *in invitum*, are to be strictly construed, and whatever is essential to their validity must be affirmatively shown by the party who claims under them. *Hecht v. Boughton*, 385.
12. **IDEM.**—Constitutional law forbids the levying of a tax before the owner of property has had an opportunity to object to the assessment. *Id.*

TREASURER OF ALBANY COUNTY. (*See Taxation*, 7.)

UNDERTAKING.

1. **UNDERTAKING : APPEAL FROM JUSTICE'S COURTS.**—The legislature, in requiring a given undertaking, on appeal from justice's courts, and then proceeding to provide a form for it, intends to provide through the form for all that the instrument should contain, and when it also declares that the undertaking may follow the given form, it in express terms declares the sufficiency of the form. *Jenkins et al. v. Emery*, 58.
2. **IDEM.**—The statute requires the justice to approve the undertaking before allowing the appeal ; this means that he must pass upon the sufficiency of the undertaking, both as to form and the qualifications of the surety, and his approval of the instrument is an affirmation that

the surety is qualified; if this appears in the record, the affirmation appears there. The fact that the justice allowed the appeal shows affirmatively by the record, that he approved the undertaking. *Id.*

3. (*See Replevin.*)

VERDICT.

1. VERDICT.—Where a verdict is what it should have been, though erroneously reached, it must stand. *Fillmore v. The U. P. R. R. Co.*, 94
2. (*See Evidence.*)

WEIGHT OF EVIDENCE. (*See Jurisdiction*, 2.)

WRIT OF ERROR. (*See Practice*, 1.)

WRITTEN INSTRUMENTS. (*See Alterations in.*)

VOL. II.—33

RULES OF THE SUPREME COURT

OF THE

TERRITORY OF WYOMING.

CLERK OF THE COURT—GENERAL DUTIES.

Rule 1.—The clerk of this court shall reside and keep his office at the capital. He shall not practice as an attorney or counselor in this or any other court of the territory, while he is clerk. He shall not permit any record or paper to be taken from his office without an order of the court or of one of the judges for its or his own use. He shall promptly notify by letter of any decision rendered one of the attorneys of each side, when such attorneys are not in attendance upon the court at the time the decision is rendered.

CLERK'S DUTY IN MAKING UP TERM DOCKET.

Rule 2.—Five days before each term the clerk of the court shall prepare a calendar for the court and one for the bar, wherein the cases brought into this court shall be entered in the following order :

I. Cases in which the United States is a party.

II. Criminal cases arising under the laws of the territory ; and

III. All others ; each class to be arranged in the order of filing the transcripts.

THE DUTY OF THE CLERK AS TO APPEARANCE DOCKET.

Rule 3.—The clerk shall enter upon the appearance docket, in proper column, the fact, where such is the case,

that the appeal was taken in term, and duly perfected by filing the record within the time limited.

When the appeal is not taken as above, the clerk shall note the date at which it was taken, and also note the fact whether or not the proper notice was given to the appellee, and like action shall be taken by the clerk in all cases brought into this court by proceedings in error or writ of error.

THE JOURNAL.

Rule 4.—The clerk shall, on the opening of the court each day, read the journal entries of the preceding day of the term, and the same, if correct, or when needing correction, as soon as corrected, shall be signed by the Chief Justice or such one of the associates in the absence of the Chief Justice, as may be presiding, before the court shall proceed to other business. The journal entries of the last day of the term shall be read and signed in the presence of the court or a majority thereof before a final adjournment shall be had.

MOTIONS.

Rule 5.—All motions shall be in writing and subscribed by counsel, and must be presented in open court.

OF MOTIONS FOR NEW TRIAL IN THE DISTRICT COURTS.

Rule 6.—No case will be heard in court unless a motion for a new trial shall have been made in the court below in which all matters of error and exceptions have been presented, argued, and the motion overruled, and exceptions taken to the overruling of said motion, all to be embraced in the bill of exceptions when the decision is not entered on the journal and the grounds of objection do not sufficiently appear in the journal entries of the court. Provided, that where actions are dismissed by reason of a demurrer to plaintiff's petition being sustained, that it shall be sufficient to carry the case up by filing a certified copy of the record with the briefs of counsel.

AS TO READING RECORDS AND CITING AUTHORITIES.

Rule 7.—In no case is it necessary or proper to read the record to the court; but counsel may refer thereto, and state what they consider as proved, on which they rely. And in all cases it is recommended to the gentlemen of the bar to select and cite only the most pertinent authority.

BRIEFS.

Rule 8.—No case will be considered by this court until printed copies of the briefs of attorneys on both sides shall be presented to the court; or if either side neglects or refuses to furnish a printed copy of his brief, the case will be heard and determined upon the one presented. Fourteen copies of the printed briefs on each side shall be deposited with the clerk of this court, to be distributed as the copies of the printed transcript on writs of error, proceeding in error or on appeal, are required to be distributed.

OF ARGUMENTS.

Rule 9.—The counsel having the affirmative, or the one who takes the appeal or writ of error, shall be entitled to the opening and closing. In his opening he shall present all the authorities and points on which he relies; the counsel opposed shall then be heard and shall present all his authorities and his defense generally, and the counsel for the appeal, writ of error, or affirmative as the case may be, shall conclude. The counsel on either side of the case shall not occupy in argument exceeding ninety minutes, except by leave of the court, obtained before arguments are commenced.

OF UNPERFECTED APPEALS, ETC.

Rule 10.—When notices of appeals or writs of error have been filed and undertakings entered into in the district courts—but where the appellants or parties applying by writs or petitions in error fail to enter their appeals or to properly enter their errors in this court, the appellee or defendant in error by himself or counsel may apply to the

court on or after the first day of the term for a rule on the appellant or plaintiff in error to be served on him or his counsel on the record in the court below, to show cause why the appeal or writ or petition in error should not be stricken off and the judgment affirmed.

Upon the taking of such rule, the court shall fix a day (during the term) for the return and hearing on the rule; and if no sufficient cause be shown to the contrary, the rule shall be made absolute, and the clerk shall certify the proceedings to the district court, from whence the record should have come, and said certificate shall (showing the amount of the judgment, including interest, costs and damages allowed) be a sufficient order for the issuance of execution.

OF RETURN OF WRITS OF ERROR.

Rule 11.—Upon the return of a writ of error to the clerk of this court, said clerk shall notify the attorney of record of the plaintiff in error in writing by mail (keeping a record of the date of such notice) that thirty days are allowed in which he is required to file his list of errors relied upon on the argument of the case in this court. And in the event of there being no attorney of record in this territory, then such notice may be made in the same manner upon the plaintiff in error. And in the event of the non-residence of both plaintiff in error and attorney, then the notice shall be by publication in a daily newspaper, published at the capital of this territory, by three insertions in said paper; and the thirty days to begin to run from the date of the last publication.

PRINTING TRANSCRIPT.

Rule 12.—No case will hereafter be heard until the appellant or the plaintiff in error shall deliver to the clerk fourteen printed copies of an abstract of so much of the record as is necessary for a full understanding of all the questions presented to this court for decision, of which copies six shall be for the court, two for the adverse party, two for the territorial library, two for the reporter, and two

to remain with the clerk; said copies to be delivered to the clerk by the plaintiff in a writ of error within thirty days from the issuance of the writ, by the petitioner in error within thirty days after filing the petition, and by the appellant within seven months after filing the notice of appeal. The reasonable cost of the printing shall be taxed in favor of the prevailing party.

If the appellee or defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect, he may within twenty days after the delivery of said copies to the clerk, deliver to the latter fourteen printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision, to be distributed like the original fourteen copies; and if the court at the hearing shall deem the additional transcript of the record thus furnished necessary, the court shall tax the cost of the same to the defendant in error or appellee, if he prevail. The printed transcripts required by this rule shall in all cases be paged, numbered and indexed, the index in every case to refer specifically by page, and number of page, to everything that may be deemed material in the case to a proper understanding of such case.

The supreme court or any member of it may excuse a convict from observing the above requirements of this and rule 8 for printing briefs, on proof of his pecuniary inability to comply with them. The excuse by a member of the court to be by certificate, filed with the clerk.

CLERK'S DUTY WHEN CASES DECIDED.

Rule 13.—Where a judgment of the court below is reversed or modified, a certified copy of the opinion, together with the decision in the case, shall be transmitted to the court below. In every case the order of affirmance, modification or reversal, and the opinion when necessary under this rule, shall be sent to the court below within fifteen days after being entered on the journal by the clerk of this court, unless otherwise directed, or proceedings be stayed by appeal or writ of error.

RULES OF THE DISTRICT COURTS

OF THE

TERRITORY OF WYOMING.

OF THE ADMISSION OF ATTORNEYS.

Rule 1.—When any person shall make application for admission to practice in any district court as an attorney-at-law, the court shall appoint a committee of not less than three members of the bar, who shall examine the applicant, and if, after such examination, the committee shall make a favorable report as to the competency of the applicant, including the statutory requirements, he may, in the discretion of the court, be admitted on taking the required oath.

READING THE JOURNAL.

Rule 2.—The clerk shall, immediately after the opening of court on each day, read the journal entries of the preceding day, that any errors occurring therein may then be corrected. The judge presiding shall, as soon after the adjournment of the term as practicable, sign the journal of the term.

OF MOTIONS.

Rule 3.—All motions shall be made in writing, specifying cause for the same, and when founded on matters of fact not appearing in the pleadings, or other proceedings in the case, must be supported by affidavit, which shall be filed with the motion. And no motion will be heard except by

order of the court, unless written notice thereof shall be served upon the opposite attorney at least one day prior to the time fixed for such hearing, if the attorney lives in the same county, or at least three days prior thereto if the attorneys live in different counties.

OF AGREEMENTS TO BE MADE IN WRITING.

Rule 4.—No private agreement, stipulation or consent, between parties or counsel, in respect to any matter or proceeding in a cause, shall be alleged or suggested by either party against the other, unless the same is in writing and signed by the party against whom it is so alleged or suggested—or is entered into in open court and noted on the journal of the court.

OF FILING PAPERS.

Rule 5.—Every paper filed in a cause shall have indorsed thereon the name of the paper and the cause to which it belongs, and the name of the attorney filing the same. When not so indorsed the paper may, on motion and in the discretion of the court, be stricken from the files of the court.

OF CONTINUANCE OF CASES.

Rule 6.—All motions for the continuance of cases, whether criminal or civil, shall be presented in writing, supported by affidavit of the party (his agent or attorney), applying therefor, stating the facts on which the motion is founded, unless they appear on the record; but on the hearing of the motion for a continuance, the affidavit in support thereof will be taken as true; and no contradictory, supplemental or amended affidavit, or statement, will be permitted unless by leave of the court. The court in its discretion may receive an oral or written statement of the prosecuting attorney for the county, or the U. S. district attorney, for a continuance, in lieu of an affidavit.

OF THE AMENDMENTS OF PLEADINGS.

Rule 7.—A party having obtained leave to amend a

pleading, who fails to do so within the time limited, shall be considered as electing to abide by his former pleading. And in no case of amendment shall the original pleading be withdrawn from the files, or obliterated, unless leave be given to substitute the amendment for the original pleading, in which case a certified copy of such original pleading shall be retained by the clerk in the files; nor shall the amendment be made by erasure or interlineation, except by leave of the court.

OF JUDGMENTS BY DEFAULT.

Rule 8.—When a default has been entered for want of an appearance, of a plea, or from any other cause, it will be set aside only upon an affidavit of merit, and of diligence, or explaining satisfactorily the want of diligence.

OF DEPOSITIONS.

Rule 9.—Sec. 1. In all cases when depositions are suppressed, and the court, on examination of the same, shall find them to be material, the cause shall be continued for that term, on the application of the party whose depositions are suppressed, unless the objections to the depositions be waived, but no continuance for defect of the depositions of the same witnesses shall be allowed more than once.

Sec. 2. Depositions to be used in any district court shall not be taken in term time except by consent, unless the court, for good cause shown, shall otherwise order. A motion for leave to take depositions during any term of the court shall be in writing, and shall state particularly the reasons for taking them, which application shall be supported by affidavit.

OF IMPANELING JURIES.

Rule 10.—Twelve jurors shall be called to the box and examined on their *voir dire*, if either party desire to so examine them. After the parties have passed for cause, in civil cases, the plaintiff may challenge one juror peremptorily, and the defendant may then challenge one peremptorily, and so on alternately until the jury is accepted or the per

emptory challenges exhausted. Either party passing a challenge at the proper time to use it, shall be deemed to have waived the challenge.

In criminal cases punishable capitally, and in other felonies, the right of challenge shall be exercised as follows: First, the prosecution shall have one and the defense three, and so on until the jury be accepted or the challenges exhausted. Either party failing to exercise the challenge at the proper time shall be taken to have waived the challenge. But in either criminal or civil cases, neither party shall be compelled to exercise any challenge unless the number of twelve shall be in the jury box at the time.

ON INSTRUCTION TO JURIES.

Rule 11.—When the court is asked to instruct the jury in any cause, the instructions asked for must be prepared by the counsel of the respective parties, and submitted to the court (legibly and plainly written, on one side of the paper only, so that any one thereof may be detached and withdrawn from the others) before the commencement of the argument in criminal cases or the concluding argument in civil cases, or they will not be considered by the court. If required, the court will allow time before the argument is commenced for the preparation of the instructions asked.

OF COMPUTATION OF JUDGMENT.

Rule 12.—In all cases where no jury trial is had, the clerk of the court, under the direction and subject to the control of the court, shall make all assessments of damages and computations of interest.

CASES NOT DISPOSED OF DURING TERM STAND CONTINUED.

Rule 13.—All cases and matters pending in any district court at any time and not otherwise disposed of during the term, will stand continued as of course.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES
ON THE
WYOMING REPORTS
VOL. II.

INCLUDING THE CITATIONS OF EACH CASE AS A PRECEDENT (1) BY ANY COURT OF LAST RESORT IN ANY JURISDICTION OF THIS COUNTRY; (2) BY THE EXTENSIVE AND THOROUGH ANNOTATIONS OF THE LEADING ANNOTATED REPORTS.

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NOTES

ON THE

WYOMING REPORTS.

CASES IN 2 WYOMING.

2 WYO. 1, McLAUGHLIN v. VENINE.

2 WYO. 3, KANSAS P. R. CO. v. McCANN.

2 WYO. 6, KENT v. CHEYENNE.

Liability of municipality for failure to abate nuisance.

Cited in *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101, 44 S. E. 830, holding that municipality is not liable for failure or refusal to exercise judicial power to abate nuisance on private property.

2 WYO. 8, MOORE v. SWEETWATER COUNTY.

Power of state or territory to tax property on Indian reservation.

Cited in *Cooley*, Tax. 3d ed. 85, on taxability by state of lands patented to Indians.

Disapproved in *Noble v. Amoretti*, 11 Wyo. 230, 71 Pac. 879, holding that state has power to tax stock of goods of licensed Indian trader upon Indian Reservation.

Overruled in *Torrey v. Baldwin*, 3 Wyo. 430, 26 Pac. 908, holding that territory can tax cattle of white man located on Indian Reservation.

Power of territory over military reservation.

Distinguished in *Territory v. Burgess*, 8 Mont. 57, 1 L.R.A. 808, 19 Pac. 558, holding that territorial district court has jurisdiction over murder committed on military reservation.

Recovery back of taxes.

Disapproved in *Johnson County v. Searight Cattle Co.* 3 Wyo. 777, 31 Pac. 268, holding that no action for recovery back of taxes illegally assessed can be brought against county.

2 WYO. 27, McLAUGHLIN v. UPTON.

2 WYO. 32, McLAUGHLIN v. UPTON, Reversed in 105 U. S. 640, 26 L. ed. 1197, Hearing on remand from United States Supreme Court in 3 Wyo. 48, 2 Pac. 534.

2 WYO. 53, KENT v. UPTON, Reversed in 105 U. S. 646, note 26 L. ed. 1200, Hearing on remand from United States Supreme Court in 3 Wyo. 43, 2 Pac. 234.

2 WYO. 54, UPTON v. STEELE, Writ of error dismissed in 154 U. S. 675, Appx. and 26 L. ed. 1069, 14 Sup. Ct. Rep. 1214.

2 WYO. 55, UPTON v. MASON, Writ of error dismissed in 154 U. S. 675, Appx. and 26 L. ed. 1069, 14 Sup. Ct. Rep. 1214.

2 WYO. 56, O'BRIEN v. CHINIQUY.**2 WYO. 58, JENKINS v. EMERY.**

Approval of bond.

Cited in Brandt, Suretyship, 3d ed. 1133, approval of official bond as affecting sureties thereon.

2 WYO. 63, WARNER v. ROTH.

Right of vendor to reclaim property.

Cited in Bunce v. McMahon, 6 Wyo. 24, 42 Pac. 23; Grand Rapids Furniture Co. v. Grand Hotel & Opera House Co. 11 Wyo. 128, 70 Pac. 838,—holding that vendor, in conditional sale, may reclaim property, though in possession of third party, who takes it in good faith and without notice.

2 WYO. 71, STEBBINS v. UNION P. R. CO.

Negotiability of note.

Cited in note in 35 L.R.A. 647, on negotiability of note payable out of particular fund.

2 WYO. 80, PRICE v. BONNIFIELD, Writ of error dismissed in 145 U. S. 672, Appx. and 26 L. ed. 1022, 14 Sup. Ct. Rep. 1194.

Judgment on demurrer as bar.

Cited in Edwards v. Bates County, 55 Fed. 436, holding that judgment for defendant on demurrer to petition on ground that action is barred by statute of limitations is bar to second suit; Luttrell v. Reynolds, 63 Ark. 254, 37 S. W. 1051, holding that judgment sustaining demurrer to complaint and dismissing complaint is bar to another

action; *Cain v. Union Cent. L. Ins. Co.* 123 Ky. 59, 124 Am. St. Rep. 313, 93 S. W. 622, holding that judgment sustaining demurrer to reply to answer setting up statute of limitations and dismissing action is bar to second action.

2 WYO. 86, BROPHY v. J. M. BRUNSWICK & B. CO.

2 WYO. 94, FILLMORE v. UNION P. R. CO.

Admission of evidence first elicited on cross-examination.

Cited in *German-American Ins. Co. v. Brown*, 75 Ark. 251, 87 S. W. 135; *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494, holding that affidavit or letters, first inquired about on cross-examination, to discredit witness, may be introduced in evidence on re-examination to corroborate witness.

Right to impeach one's own witness.

Cited in note in 21 L.R.A. 419, on right to impeach one's own witness.

Vacation of erroneously reached verdict.

Cited in *Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749, holding that verdict will not be vacated because arrived at by chance, unless it affirmatively appears that jurors bound themselves in advance to, and did, obtain verdict that way.

2 WYO. 100, UNION P. R. CO. v. BYRNE.

2 WYO. 113, FEIN v. TONN.

Vacation of verdict as against evidence.

Cited in *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700,—holding that verdict will not be vacated, unless not sustained by evidence or so clearly against evidence as to be manifestly result of passion, etc.

2 WYO. 118, FEIN v. DAVIS.

2 WYO. 125, BEAUCAIRE v. SAWYER.

2 WYO. 126, CASTLE v. UINTA COUNTY.

2 WYO. 130, CARR v. RYAN.

2 WYO. 135, FARRELL v. ALSOP.

2 WYO. 141, FALLEN v. FERRIS.

2 WYO. 144, WARE v. WANLESS.

Validity of assignment for creditors.

Cited in *McCord-Brady Co. v. Mills*, 8 Wyo. 258, 46 L.R.A. 737,

56 Pac. 1003, holding that assignment by firm for creditors, requiring release of debtor, must embrace individual property of partners.

2 WYO. 170, UNION P. R. CO. v. UNITED STATES, Writ of error dismissed in 105 U. S. 263, 26 L. ed. 1021.

Undertaking in replevin as substitute for property.

Cited in *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, holding that plaintiff's undertaking in replevin stands in place of property to extent of defendant's interest and property passes into exclusive possession of plaintiff.

2 WYO. 194, JOHNS v. ADAMS.

Requisites to review of case.

Cited in *United States v. Trabing*, 3 Wyo. 144, 6 Pac. 721; *Boulter v. State*, 6 Wyo. 66, 42 Pac. 606; *Freeburgh v. Lamoureux*, 12 Wyo. 41, 73 Pac. 545,—holding that objections ground for new trial will not be reviewed, unless so presented and exception preserved in bill of exceptions.

Stenographer's notes as bill of exceptions.

Cited in *Conway v. Smith Mercantile Co.* 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940, holding that stenographer's notes, though made prima facie correct by statute, are not sufficient without authentication of court.

2 WYO. 206, HINTON v. WINSOR.

Jurisdiction of district court under act of December 15, 1877.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 213, GARBANATI v. BECKWITH.

Jurisdiction of district court under act of December 15, 1877.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 216, GARBANATI v. BECKWITH.

Jurisdiction of district court under act of December 15, 1877.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 231, GRANGER v. LEWIS.

2 WYO. 252, SNYDER v. JAMES.

Time for commencement of proceedings in error.

Cited in *School Dist. No. 3 v. Western Tube Co.* 13 Wyo. 304, 80

Pac. 155, as to whether nunc pro tunc entry of findings require statutory period for taking proceedings in error to be computed from date of nunc pro tunc order instead of date of judgment.

Distinguished in *Conrad v. Lepper*, 13 Wyo. 99, 78 Pac. 1, 3 A. & E. Ann. Cas. 627, sustaining proceeding in error commenced within one year from order overruling motion for new trial.

2 WYO. 257, GARBANATI v. UINTA COUNTY.

Necessity of bill of exceptions to review.

Cited in *Boulter v. State*, 6 Wyo. 66, 42 Pac. 606; *Freeburgh v. Lamoureux*, 12 Wyo. 41, 73 Pac. 545,—holding that supreme court will not review errors in record unless accompanied by bill of exceptions, in which motion for new trial is incorporated.

Jurisdiction of second judicial district court.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 259, SWEETWATER COUNTY v. JOHNSON.

Jurisdiction of second judicial district court.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 271, GARBANATI v. HINTON.

Vacation of verdict as against evidence.

Cited in *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700,—holding that verdict will not be vacated, unless not sustained by evidence, or so clearly against evidence as to be manifestly result of improper motives.

Jurisdiction of second judicial district court.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 274, McCANN v. UNITED STATES.

Sufficiency of indictment for embezzlement.

Cited in *Moore v. United States*, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. Rep. 294, 10 Am. Crim. Rep. 283, holding that indictment, charging that employee of postoffice embezzled sum of money, property of United States, is insufficient; *State v. Turner*, 10 Wash. 94, 38 Pac. 864, holding that information charging embezzlement substantially in terms of statute is sufficient.

Cited in note in 98 A. D. 139, 151, 154, 160, 165, on embezzlement.

Territorial court sitting as United States court.

Cited in *United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407, as to

propriety of issuing venire to U. S. marshal in action by territorial court under act of Congress.

2 WYO. 312, LEE v. COOK.

Jurisdiction of second judicial district court.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 331, TERRITORY v. CONLEY.

Necessity of petition in error in proceedings on exceptions by prosecuting attorney.

Cited in *State ex rel. Gibson v. Cornwell*, 14 Wyo. 526, 85 Pac. 977, on necessity of petition in error in proceeding in supreme court upon bill of exceptions in criminal case filed by prosecuting attorney.

Jurisdiction of second judicial district court.

Cited in *White v. Hinton*, 3 Wyo. 753, 17 L.R.A. 66, 30 Pac. 953, on jurisdiction of second judicial district court under act of December 15, 1877.

2 WYO. 346, TERRITORY v. NELSON.

Necessity of petition in error in proceedings on exceptions by prosecuting attorney.

Cited in *State ex rel. Gibson v. Cornwell*, 14 Wyo. 526, 85 Pac. 977, on necessity of petition in error in proceeding in supreme court upon bill of exceptions in criminal case filed by prosecuting attorney.

Constitutionality of statute for imprisonment without state.

Cited in *Kingen v. Kelley*, 3 Wyo. 566, 15 L.R.A. 177, 28 Pac. 36, on constitutionality of statute authorizing imprisonment for crime elsewhere than in state wherein crime was committed.

2 WYO. 385, HECHT v. BOUGHTON, Writ of error dismissed in 105 U. S. 235, 26 L. ed. 1018.

Tax proceedings as in invitum.

Cited in *Birney v. Warren*, 28 Mont. 64, 72 Pac. 293, holding that assessment and sale of property for delinquent taxes is proceeding in invitum.

— Necessity for compliance with statute.

Cited in *State v. Crookston Lumber Co.* 85 Minn. 405, 89 N. W. 173, holding that tax proceedings must stand or fall by record made in compliance with statutory requirements.

Cited in *Cooley*, Tax. 3d ed. 729, on necessity that name given in tax list be correct one; *Cooley*, Tax. 3d ed. 578, on record of doings of convention of town delegates in voting county tax as only evidence to show that tax was duly granted; *Cooley*, Tax. 3d ed. 577, on parol levy of taxes as not permissible.

2 WYO. 406, JUBB v. THORP.**Allowance of bill of exceptions out of court.**

Distinguished in *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, holding that judge, before whom case was tried, may, after expiration of term of office, allow and sign bill of exceptions.

Time of presenting bill of exceptions.

Cited in *Conway v. Smith Mercantile Co.* 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940, to point that order giving until certain day to present bill of exceptions includes such day.

2 WYO. 408, UNION P. R. CO. v. RYAN, Reversed in 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601.**Collection of tax.**

Cited in *Cooley*, Tax. 3d ed. 1427, on necessity for paying or offering to pay tax justly due where tax is void only because of informality.

Cited in notes in 69 A. D. 201, on injunction against collection of taxes and assessments; 22 L.R.A. 703, on injunction against collection of illegal taxes.

2 WYO. 441, McNAMARA v. O'BRIEN.**Review without exception or appearance at trial.**

Cited in *Nichols v. Weston County*, 13 Wyo. 1, 76 Pac. 681, 3 A. & E. Ann. Cas. 543, to point that final judgment may be reversed on error, though no exception was taken by party complaining and no appearance by him at trial and no motion made to set aside judgment.

2 WYO. 443, O'BRIEN v. CLARK.**2 WYO. 447, McNAMARA v. O'BRIEN.****Vacation of verdict as contrary to law.**

Cited in *Edwards v. O'Brien*, 2 Wyo. 493, holding that court will set aside verdict, when clearly contrary to law, or without evidence to sustain it.

2 WYO. 457, WOODS v. HILLIARD FLUMES & LUMBER CO.
Allowance of bill of exceptions out of court.

Distinguished in *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, holding that judge, before whom case was tried, may, after expiration of term of office, allow and sign bill of exceptions.

Time of presenting bill of exceptions.

Cited in *Conway v. Smith Mercantile Co.* 6 Wyo. 327, 49 L.R.A. 201, 44 Pac. 940, to point that order giving until certain day to present bill of exceptions includes such day.

2 WYO. 459, HOY v. SMITH.

2 WYO. 462, MOSHER v. UINTA COUNTY.**Validity of judgment, leaving amount of costs blank.**

Cited in *Hecht v. Harrison*, 5 Wyo. 279, 40 Pac. 306, holding that judgment for costs only, leaving amount thereof blank, will be reversed.

Distinguished in *Big Goose & B. Ditch Co. v. Morrow*, 8 Wyo. 537, 80 Am. St. Rep. 955, 59 Pac. 159, holding that judgment for stated amount and costs is not void as to costs because amount thereof is left blank.

2 WYO. 465, MULHERN v. UNION P. R. CO.**Withdrawal of case from jury.**

Cited in *Zittle v. Schlesinger*, 46 Neb. 844, 65 N. W. 892, denying authority of trial court to enter involuntary nonsuit, because plaintiff fails to establish cause of action; *Friend v. Oggshaw*, 3 Wyo. 59, 31 Pac. 1047, holding it error to dismiss action for recovery of mining claim, where part of material allegations of petition are admitted in answer; *Man v. Stoner*, 10 Wyo. 125, 67 Pac. 618, holding it error to direct verdict for defendant, where there is any evidence tending to prove plaintiff's case.

Cited in *Abbott's Civ. Tr.* 2d ed. 374, on inability to order compulsory nonsuit.

2 WYO. 478, UNION P. R. CO. v. DONNELLAN.**Effect of invalid assessment.**

Cited in *Martin v. Barbour*, 34 Fed. 701, holding that assessment cannot be made foundation of valid tax title, where assessor fails to take oath.

Assessment upon neglect of assessor.

Cited in *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788, holding levy of school taxes by town trustees upon failure of school trustees to do so is void.

Distinguished in *Horton v. Driskell*, 13 Wyo. 66, 77 Pac. 354, 3 A. & E. Ann. Cas. 561, holding that county board of equalization can add omitted taxable property to assessment roll, though no property was assessed to owner by assessor and his name was not upon assessment roll.

2 WYO. 493, EDWARDS v. O'BRIEN.**Vacation of verdict as against evidence.**

Cited in *Ketchum v. Davis*, 3 Wyo. 164, 13 Pac. 15; *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 62 Am. St. Rep. 47, 34 Pac. 1059; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774; *Jackson v. Mull*, 6 Wyo. 55, 42 Pac. 603,—holding that new trial will not be granted unless verdict is clearly erroneous or against great weight of evidence; *Marshall v. Rugg*, 6 Wyo. 270, 33 L.R.A. 679, 44 Pac. 700, holding that court will set aside verdict if contrary to law, or without evidence to sustain it.



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